

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

TRANSCRIPT OF RECORD

Court of Appeals of the District of Columbia

JANUARY TERM, 1933

No. 5903

341

ESTATE OF RICHARD B. TURNER, APPELLANT,

Guy J. Hehring vs.

~~DAVID BURNET~~, COMMISSIONER OF INTERNAL
REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

FILED FEBRUARY 14, 1933.

PRINTED APRIL 5, 1933.

Court of Appeals of the District of Columbia

JANUARY TERM, 1933

No. 5903

ESTATE OF RICHARD B. TURNER, APPELLANT,

vs.

DAVID BURNET, COMMISSIONER OF INTERNAL
REVENUE.

APPEAL FROM THE BOARD OF TAX APPEALS.

INDEX.

	Original	Print
Docket entries.....	1	1
Petition	2	3
Answer	6	7
Amendment to petition.....	7	8
Suggestion of death, etc.....	8	9
Order, entered September 23, 1932.....	9	9
Order, entered October 4, 1932.....	10	10
Findings of fact and opinion.....	11	11
Decision	17	15
Petition for review.....	18	16
Statement of evidence.....	23	20
Præcipe	32	29
Certificate	33	30

Court of Appeals of the District of Columbia

No. 5903.

ESTATE OF RICHARD B. TURNER, Appellant,

vs.

DAVID BURNET, Commissioner of Internal Revenue.

1

Docket No. 53554.

ESTATE OF RICHARD B. TURNER

vs.

COMMISSIONER OF INT. REV.

For Taxpayer: James Craig Peacock, Esq.

For Commissioner: J. M. Morawski, Esq., Prew Savoy,
Esq.

Docket Entries.

1931.

Mar. 9. Petition received and filed. Taxpayer notified.
(Fee paid.)

“ 9. Copy of petition served on General Counsel.

Apr. 11. Answer filed by G. C.

“ 16. Copy of answer served on taxpayer—General
Calendar.

1932.

Mar. 17. Hearing set April 27, 1932.

Apr. 27. Hearing had before Mr. Smith, Div. 5, on merits.
Stipulation of facts read into record. Sub-
mitted to Mr. Smith. Suggestion of death &
motion to substitute filed and granted. Peti-
tioner's brief 45 days. None for Commissioner.

“ 27. Motion to substitute James L. Rankin as Executor
of Estate of R. B. Turner filed at hearing and
granted.

1932.

- June 1. Motion for 30 days extension after receipt of transcript to file brief filed by taxpayer.
- “ 2. Motion granted.
- July 12. Transcript of hearing 4-27-32 filed.
- Aug. 5. Stipulation for correction of transcript filed by taxpayer.
- “ 5. Brief filed by taxpayer.
- Sept. 23. Order amending caption of petition to read James L. Rankin, Executor of Estate of Richard B. Turner, entered.
- Oct. 4. Order to vacate order of Sept. 27, 1932 and that the caption of petition read “Estate of Richard B. Turner” as granted in motion of April 27, 1932, entered.
- “ 14. Findings of Fact and opinion rendered, Mr. Smith, Div. 5. Judgment will be entered for the Commissioner.
- “ 17. Decision entered—Mr. Smith, Div. 5.

1933.

- Jan. 6. Petition for review to Ct. of Ap. of D. C. with assignments of error, filed by taxpayer. Proof of service thereon.
- “ 6. Petition for review to U. S. Cir. Ct. of Ap. (3) with assignments of error filed by taxpayer. Proof of service thereon.
- “ 6. Statement of evidence lodged.
- “ 6. Notice of lodgment of statement & of hearing Jan. 18, 1933 to approve statement filed.
- “ 19. Praecipe with proof of service thereon filed.
- “ 23. Statement of evidence approved and ordered filed.
- “ 18. Hearing had before Mr. Smith, Div. 5, on approval of statement of evidence. Statement of evidence approved.
- “ 31. Transcript of hearing Jan. 18, 1933 filed.

2

Filed March 9, 1931.

United States Board of Tax Appeals.

Docket No. 53554.

RICHARD B. TURNER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Petition.

The above-named petitioner hereby petitions for a re-determination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency IT:AR:B-1 ARM-60D, dated January 29, 1931, and as a basis of his proceeding alleges as follows:

1. The petitioner is an individual with principal office at 8 West Sixth Street, Chester, Pennsylvania.

2. The notice of deficiency (a copy of which is attached and marked Exhibit A) was mailed to the petitioner on January 29, 1931.

3. The taxes in controversy are income taxes for the calendar year 1928 and for \$11,173.05.

4. The determination of tax set forth in the said notice of deficiency is based upon the following errors:

(a) The Commissioner erred in including in petitioner's income any amount in excess of \$25,933.50 on account of profits on sales in 1928 of United Gas Improvement common stock (hereinafter referred to as U. G. I. stock).

(b) The Commissioner erred in holding that because petitioner's records fail to specify the sales as applying to any particular parcel of stock sold the evidence therefore indicates that the identity of the shares sold cannot be determined.

(c) The Commissioner erred in using the cost of the earliest purchases as the proper basis for computing gain on the shares sold.

(d) The Commissioner erred in not using the cost of the stock received as a stock dividend in 1926 as the basis for computing gain on the shares sold on May 8, 1928.

(e) The Commissioner erred in not using the cost of the shares purchased June 8, 1928, as the basis for computing gain on the shares sold on October 22 and November 7, 1928.

5. The facts upon which the petitioner relies as the basis of this proceeding are as follows:

(a) During 1926 petitioner bought 1200 shares of United Gas Improvement Company common stock on margin through West & Company, a firm of stock brokers in Philadelphia, Pa., for \$117,202.50.

(b) On November 22, 1926, a stock dividend of 25% was paid, so that on December 31, 1926, petitioner's account with West & Company showed 1500 shares of U. G. I. stock long.

(c) During 1927 petitioner had no transactions in U. G. I. stock or any other stock, and at December 31, 1927 his account similarly showed 1500 shares of U. G. I. stock long.

3 (d) On May 8, 1928, petitioner sold for \$44,619.00 the 300 shares of U. G. I. stock which he had received as a stock dividend in 1926.

(e) On May 31, 1928, his account with West & Company showed 1200 shares of U. G. I. stock long, and no other shares of any other stock long or short.

(f) On June 8, 1928, petitioner bought for \$143,225, on margin in the same account 1000 shares of U. G. I. stock.

(g) On October 22, 1928, petitioner sold for \$73,865, half (i. e. 500 shares) of the 1000 shares which he purchased on June 8, 1928.

(h) On November 7, 1928, petitioner sold for \$74,115 the remaining 500 shares of the 1000 shares which he bought on June 8, 1928.

(i) On December 31, 1928 petitioner still held the original 1200 shares of U. G. I. stock which he had purchased in 1926.

(j) In the deficiency letter the respondent included in petitioner's income for 1928 \$92,864 as the profit on the sale of the 1300 shares of U. G. I. stock which petitioner sold during 1928.

Wherefore the petitioner prays that this Board may hear the proceeding and determine that the profit to be included in petitioner's income for 1928 on account of sales of U. G. I. stock should be reduced from \$92,864.00, as determined by the Commissioner, to not more than \$25,933.50, and that

the deficiency proposed by the Commissioner should be correspondingly redetermined.

JAMES CRAIG PEACOCK,

Counsel for Petitioner,

1366 National Press Bldg.,

Washington, D. C.

STATE OF PENNSYLVANIA,

County of Delaware, ss:

Richard B. Turner, being duly sworn, says that he is the petitioner above-named; that he has read the foregoing petitioner, or had the same read to him, and is familiar with the statements contained therein, and that the facts stated are true to the best of his knowledge, information, and belief.

RICHARD B. TURNER.

Subscribed and sworn to before me this 18 day of February, 1931.

[SEAL.]

MATTHEW RANKIN,

Notary Public.

Commission expires March 5, 1933.

4

EXHIBIT "A".

Treasury Department, Washington.

Office of Commissioner of Internal Revenue.

January 29, 1931.

Address reply to Commissioner of Internal Revenue and refer to IT:AR:B-1. ARM-60D.

Mr. Richard B. Turner,

511 Welsh Street,

Chester, Pennsylvania.

SIR:

You are advised that the determination of your tax liability for the year 1928 discloses a deficiency of \$11,173.05, as shown in the statement attached.

In accordance with section 272 of the Revenue Act of 1928, notice is hereby given of the deficiency mentioned. Within sixty days (not counting Sunday as the sixtieth

day) from the date of the mailing of this letter, you may petition the United States Board of Tax Appeals for a redetermination of your tax liability.

However, if you do not desire to petition, you are requested to execute the enclosed agreement form and forward it to the Commissioner of Internal Revenue, Washington, D. C., for the attention of IT:C:P-7. The signing of this agreement will expedite the closing of your return(s) by permitting an early assessment of any deficiency and preventing the accumulation of interest charges, since the interest period terminates thirty days after filing the enclosed agreement, or on the date assessment is made, whichever is earlier; whereas if no agreement is filed, interest will accumulate to the date of assessment of the deficiency.

Respectfully,

DAVID BURNET,
Commissioner,

(Signed)

By J. C. WILMER,
Deputy Commissioner.

Enclosures: Statement, Form 882, Form 870.

BH-1.

5

Statement.

IT:AR:B-1. ARM-60D.

In re Mr. Richard B. Turner, 511 Welsh Street, Chester, Pennsylvania.

Tax Liability.

Year.	Tax liability.	Tax assessed.	Deficiency.
1928	\$12,220.39	\$1,047.34	\$11,173.05

The basis of this deficiency was set forth in a Bureau letter dated December 17, 1930, which is hereby made a part of this letter.

A copy of this letter is being mailed to Mr. James L. Rankin, 12-14 East Fifth Street, Chester, Pennsylvania, in accordance with the authority conferred upon him in power of attorney executed by you and on file with this office.

BH-1.

6 [Stamp:] United States Board of Tax Appeals.
Filed Apr. 11, 1931.

United States Board of Tax Appeals.

Docket No. 53554.

RICHARD B. TURNER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Answer.

The Commissioner of Internal Revenue, by his attorney, C. M. Charest, General Counsel, Bureau of Internal Revenue, for answer to the petition of the above-named taxpayer admits and denies as follows:

1. Admits the allegations contained in paragraph 1 of the petition.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits the allegations contained in paragraph 3 of the petition.

4. Denies that Commissioner erred as alleged in paragraphs 4 (a) to (e), inclusive, of the petition.

5. Denies the allegations contained in paragraphs 5 (a) to (j), inclusive, of the petition.

Denies generally and specifically each and every allegation set forth in taxpayer's petition not hereinbefore admitted, qualified or denied.

Wherefore it is prayed that the taxpayer's appeal be denied.

C. M. CHAREST,

General Counsel,

Bureau of Internal Revenue.

Of Counsel:

PHILIP M. CLARK,

Special Attorney,

Bureau of Internal Revenue.

PMC/SBP/mcm.

4/9/31.

7 [Stamp:] U. S. Board of Tax Appeals. Filed at
Hearing Apr. 27, 1932.

United States Board of Tax Appeals.

Docket No. 53554.

ESTATE OF RICHARD B. TURNER, Deceased, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Motion to Amend Petition.

Now comes petitioner by its attorney of record and moves that the concluding prayer of the original petition be amended to read as follows:

“Wherefore, the petitioner prays that this Board may hear the proceeding and determine

(a) That the profit to be included in the taxpayer's income for 1928 on account of sales of U. G. I. stock should be reduced from \$92,864 as determined by the Commissioner, to not more than \$25,933.50, or if it cannot identify the particular 1,300 shares which were sold in 1928 at the above mentioned prices, then

(b) That there was no profit on the sale of any of said stock until out of the proceeds of sales there had first been recovered the total cost of all shares of such stock on hand at the time of such sale, or if it cannot so hold, then

(c) That Art. 58 of Regulations 74, insofar as it may be deemed by its terms to be applicable to the facts of this case, is unreasonable and invalid, and the basis should be computed by pooling the cost of all shares on hand at the time of each sale, or if it cannot so hold, then

(d) That Art. 58 of Regulations 74, if applicable, must be strictly applied according to its terms, and particularly that none of the stock sold shall be charged against stock which had been received as stock dividends.”

Respectfully submitted,

JAMES CRAIG PEACOCK,

Attorney for Petitioner.

1366 National Press Bldg.,

Washington, D. C.

Page 5, line 6, of transcript of hearing:

The Member: The amendment to the petition is granted.

8 United States Board of Tax Appeals.

Docket No. 53554.

RICHARD B. TURNER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Suggestion of Death and Motion to Substitute.

Now comes James Craig Peacock, attorney of record for petitioner in this case, and suggests to the Board the death of the said petitioner, Richard B. Turner, on February 21, 1932, and moves the substitution as petitioner of the Estate of Richard B. Turner, deceased. A certificate of the appointment of James L. Rankin as sole executor of the said estate by the Orphan's Court of Delaware County, Pennsylvania, is attached to the original of this motion.

Respectfully submitted,

JAMES CRAIG PEACOCK,

1366 National Press Bldg.,

Washington, D. C.

Granted Apr. 27, 1932.

(Signed)

CHARLES P. SMITH,

Member U. S. Board of Tax Appeals.

9 United States Board of Tax Appeals, Washington.

Docket No. 53554.

RICHARD B. TURNER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order.

At the hearing of this proceeding on April 27, 1932, counsel for the petitioner suggested the death of the petitioner, on February 21, 1932, and moved that the executor, James L. Rankin, be substituted as petitioner. The premises considered, it is—

Ordered that the motion be granted and that the caption of the petition be amended to read "James L. Rankin, Executor of the Estate of Richard B. Turner, deceased".
Enter.

[Seal U. S. Board of Tax Appeals.]

(Signed)

CHARLES P. SMITH,
Member.

September 23, 1932.

CPS:aa.

10 United States Board of Tax Appeals, Washington.

Docket No. 53554.

RICHARD B. TURNER, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Order.

It appearing that the suggestion of death and motion to substitute filed by counsel for the petitioner in the above-entitled proceeding on April 27, 1932, was granted on that date, and that in error an order was entered by the Board on September 23, 1932, granting a substitution of party, it is—

Ordered that the order of the Board entered September 23, 1932, be and the same is hereby vacated and set aside and that the caption of the petition read "*Estate of Richard B. Turner, deceased,*" as granted in the motion of counsel for the petitioner on April 27, 1932.

Enter.

[Seal U. S. Board of Tax Appeals.]

(Signed)

CHARLES P. SMITH,
Member.

October 4, 1932.

CPS:aa.

11

26 B. T. A. —.

United States Board of Tax Appeals.

Docket No. 53554.

ESTATE OF RICHARD B. TURNER, Deceased, Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Promulgated October 14, 1932.

Where the decedent in 1926 and 1928 purchased on margin through a broker at various times sundry lots of stock of United Gas Improvement Co., and in 1928 sold through the broker a portion of the stock thus held on margin, the respondent's determination that he sold those first acquired is approved.

James C. Peacock, Esq., for the petitioner.

J. M. Morawski, Esq., for the respondent.

This is a proceeding for the redetermination of a deficiency in income tax of decedent for 1928 of \$11,173.05. The question presented by this proceeding is whether a sale of a portion of the number of shares of stock, owned by the petitioner through a broker on margin, shall be applied against the latest shares purchased or against the first shares purchased.

12

Findings of Fact.

1. The decedent, who died subsequent to the filing of the petition in this case, was during the taxable year here involved and for many years prior thereto president and principal owner of the Turner Supply Co., Chester, Pa. From 1924 until his death in 1932, he was sick, and from 1928 on blind, and his two closest business associates (one was his personal attorney and also the secretary of the company, and the other was manager of the company) had to and did handle a great many of his personal affairs, including the transactions hereinafter referred to.

2. Early in 1926, a distribution in kind was made of the estate of the decedent's father, at which time he received as a part of his share of the estate about \$20,000 in bonds. He did not believe in bonds as an investment and desired to change his inheritance from his father from bonds into stock. He had several friends who were interested in United Gas Improvement Co. of Philadelphia, and after conversations with them decided to purchase as many shares of stock of the United Gas Improvement Co. as the funds to be obtained from the sale of his bonds would warrant. At his direction his attorney opened for him a marginal account with West & Company, a brokerage firm, and with the proceeds of the bonds he purchased on margin during the early part of 1926, 1,200 shares of United Gas Improvement Co. stock at a total cost of \$117,202.50.

13 3. On November 22, 1926, decedent was credited by his broker with 300 shares of United Gas Improvement Co. stock as a stock dividend on the 1,200 shares which he had purchased, making a total of 1,500 shares of that stock held on margin on December 31, 1926.

4. During 1927, the decedent had no marginal transactions in this or any other stock and took no active part in the market and at the end of that year his margin account showed 1,500 shares of United Gas Improvement Co. stock long. On June 8, 1928, the decedent bought through the same broker on margin 1,000 shares of United Gas Improvement Co. stock costing \$143,225.

On May 8, 1928, the decedent gave orders to his broker to sell 300 shares of United Gas Improvement Co. stock, which was sold for \$44,619 net. On October 22, 1928, he sold an additional 500 shares of the same stock for \$73,865, and on November 7, 1928, an additional 500 shares for \$74,115, making a total selling price for all of this stock sold in 1928 of \$192,599.

The respondent included in decedent's income for 1928 the sum of \$92,864, representing profit on the sale of 1,300 shares of United Gas Improvement Co. stock in 1928. The profit was computed as follows:

The cost of the 1,300 shares was computed at \$99,735 by taking the earliest purchases in 1926 together with the 25% stock dividend on each such purchase as follows:

125 shares (100+25)	cost	\$9,020
625 " (500+125)	"	44,475
125 " (100+25)	"	9,095
425 "	"	37,145
1,300		\$99,735

14 This last item was computed by taking the cost of the 400 shares bought June 14, 1926 (\$43,700); adding 100 shares received as a stock dividend which would give a total of 500 shares; dividing 500 into the cost of \$43,700 which would give a cost per share of \$87.40; and multiplying this \$87.40 by 425 (the number of shares necessary to make up the total of 1,300 shares) would give a cost of \$37,145 as above. The total cost of \$99,735 computed as above when deducted from the total selling price of \$192,599, leaves a profit of \$92,864.

The decedent always intended to retain the ownership on margin of 1,200 shares of the United Gas Improvement Co. stock since he had faith in the company and desired to hold that in lieu of the bonds which he had received from the estate of his father. In giving orders to his broker to sell 1,300 shares of the stock in 1928, the decedent did not specify any particular shares to be sold. An employee of the broker understood, however, that the decedent desired to retain 1,200 shares to take the place of the bonds which he had received from his father. The decedent had made it plain to his associates that the 1,200 shares were in the nature of a permanent commitment on his part.

Opinion.

SMITH:

It is the contention of the petitioner in this proceeding that since it was the intention of the decedent to retain 1,200 shares of the United Gas Improvement Co. stock as an investment, and that since that intention was understood by his associates who gave the orders to purchase and sell the stock and by an employee of the brokerage concern, it must be assumed that the 1,300 shares that were sold by the broker in 1928 represented the 300 shares received as a stock dividend and in addition the 1,000 shares

15 purchased by the decedent on June 8, 1928. The respondent rejected such contention in accordance with article 58 of Regulation 74, which provides, so far as material, as follows:

Sale of Stock and Rights.—When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock. The excess of the amount realized on the sale from the cost or other basis of the stock will constitute gain. In the case of stock in respect of which any stock dividend was paid, the basis for determining gain or loss from a sale of a share of such stock shall be ascertained in accordance with the principles laid down in article 600. * * *

The evidence indicates that the decedent in the case at bar assumed that when he purchased shares of stock on margin a certificate for a given number of shares was acquired by him and retained by the broker. When the respondent first claimed that the decedent owed an additional tax for 1928, he, through his attorney, went to the broker's office to ascertain what certificates of stock were carried to the credit of the decedent and what certificates were actually sold for him in 1928. He learned that no certificates were earmarked for the decedent on the broker's books of account and that the broker could not advise him as to any specific certificates of stock that were purchased for him in the years 1926 and 1928. The character of the transaction is stated by the Circuit Court of Appeals for the Third Circuit in *Snyder v. Commissioner*, 54 Fed. (2d) 57, in the following language:

16 * * * The evidence of the transaction and of the customer's ownership is merely a book entry of a debit of the shares purchased against a credit of the margin paid. The shares are commingled with perhaps many thousand held by the broker for other customers, subject always to be hypothecated by him in raising the difference in money between the customer's margin and the purchase price of the shares, which of course the broker must pay in order to get a certificate. The shares are not delivered

did not file the return which was filed by Mr. Turner during his lifetime. Review of the Board's decision is therefore sought in the Court of Appeals of the District of Columbia in accordance with the provisions of Section 1002 (b) of the Revenue Act of 1926.

19 The petitioner assigns the following errors in the determination and the decision of the Board:

1. The Board erred in holding that the 1,300 shares sold in 1928 were the first 1,040 shares purchased together with 260 shares received as a stock dividend thereon.

2. The Board erred in holding that the basic cost of the shares sold was \$99,735.

3. The Board erred in failing to hold that the 1,300 shares sold were the 300 shares received or credited as a stock dividend on November 22, 1926, and the 1,000 shares subsequently purchased.

4. The Board erred in failing to hold that the 1,300 shares sold had been identified as said 300 stock dividend shares and said 1,000 subsequently purchased shares.

5. The Board erred in holding that the basic cost of the 1,300 shares sold was less than \$166,665.50.

6. The Board erred in failing to find that the basic cost of the 1,300 shares sold was at least \$166,665.50.

7. The Board erred in holding that Article 58 of Regulations 74 applies to the facts of this case.

8. The Board erred in failing to hold that Article 58 of Regulations 74 is unreasonable and invalid if it by its terms applies to the facts of this case.

9. The Board erred in failing to hold that, if the 1,300 shares sold cannot be identified, then there was no profit on the sale of any shares until there had first been recovered the total cost of all shares of such stock on hand at the time of such sale.

10. The Board erred in failing to hold that, even if Article 58 of Regulations 74 is valid and applicable to the facts of this case, nevertheless by its very terms no part of the stock sold may be charged against the 300 shares received as a stock dividend.

11. The Board erred in failing to find as a fact that the 1,300 shares sold in 1928 were the 300 shares received as a stock dividend November 22, 1926, and the 1,000 shares purchased June 8, 1928.

12. The Board erred in failing to find as a fact that it was the 1,200 shares purchased in 1926 that the decedent always intended to and did retain as an inheritance from his father.

20 13. The Board erred in failing to find as a fact that beginning in March, 1928, the decedent for the first time began active buying and selling of stocks in his margin account and that in addition to the purchase of 1,000 shares of U. G. I. stock in June and the sale of 300 shares, 500 shares, and 500 shares of that stock in May, October and November respectively, he in March bought and sold 1,000 shares of General Motors and also bought 1,000 shares of Packard; in April bought 2,000 shares of Public Service of New Jersey; in May sold the Packard and Public Service stock as well as the above mentioned 300 shares of U. G. I. stock with the result that at the end of May the account contained only 1,200 shares of U. G. I. stock long; in June bought 1,000 shares of General Motors and 500 shares of Hudson Motors in addition to the above mentioned 1,000 shares of U. G. I. stock; in July sold the General Motors and 500 shares of Hudson and also bought 500 more shares of General Motors; and during the remainder of the year was even more actively buying and selling General Motors, Hudson Motors, National Power & Light, Consolidated Gas, Stanley, Electric Power & Light, Chrysler, U. S. Steel, Studebaker, Victor Talking Machine, Sun Oil, Keith-Albee, Shubert, Pennsylvania Railroad, Curtis, Kolster Radio, and A. M. Byers, mostly in 500 and 1,000 share lots.

14. The Board erred in failing to find as a fact that during 1928 decedent frequently consulted his attorney about his stock transactions and was constantly advised by the latter to sell because he believed that prices were too high; that he followed his attorney's advice as to most of his transactions except with regard to the 1,200 shares of U. G. I. stock which he had purchased in 1926; that he constantly stated to his attorney and to his other associates that he regarded it as his inheritance from his father and as a permanent investment and that he would not sell it; that he conferred with the manager of the company about his stock holdings at least once a week during that year and often discussed with him the difference between his first 1,200 shares of U. G. I. stock and the shares which

he subsequently bought; that there were two other friends who also visited him frequently at his country place and whenever any of the four were with him the conversation almost always was largely about U. G. I. and he constantly reiterated that the original 1,200 shares were a permanent holding but that the other shares of that stock he had bought with the hope of making a profit by selling them; that in computing the possible profit for the purpose of deciding whether or not to sell the 1,000 shares in 1928 the taxpayer calculated it on the basis of the cost of the 1,000 shares purchased in that year, having no thought or intent that he was selling anything but those shares and in this connection he gave no thought whatever to the stock bought in 1926; and that about the middle of December, 1928, he made an accurate calculation of his profit on this transaction on the same basis and reported the profit so computed in his income tax return for that year.

15. The Board erred in failing to find as a fact that from the very beginning West & Company knew the taxpayer's intentions and that he was keeping the first purchase of 1,200 shares; and that they had been so advised by his attorney, and at the time of the sale of the first 500 of the 1,000 shares sold late in 1928 they knew that the taxpayer understood that the sale was out of the 1,000 shares purchased during that year and that he still had the original 1,200 shares.

16. The Board erred in failing to find as a fact that decedent frequently made memorandums of his stockholdings with the prices at which he would sell them and that he made such a memorandum in which he noted such a price after every item except the 1,200 shares of U. G. I. stock.

17. The Board erred in failing to find as a fact that decedent always intended to and did retain the 1,200 shares of U. G. I. stock which he purchased in 1926.

18. The Board erred in failing to find as a fact that decedent intended to and did sell in 1928 the 300 stock dividend shares and the 1,000 shares of U. G. I. stock which he purchased in that year.

19. The Board erred in entering judgment for respondent.

Wherefore the petitioner prays that the determination and decision of the Board in this case be reviewed by the Court of Appeals of the District of Columbia, that a tran-

script of record be prepared in accordance with the law and the rules of said court and transmitted to the Clerk of the said court, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said court.

JAMES CRAIG PEACOCK,
Attorney for Petitioner.

22 DISTRICT OF COLUMBIA, ss:

James Craig Peacock being duly sworn says that he is attorney of record for the above named petitioner, that he has read the foregoing petition for review and is familiar with the statements contained therein, and that the facts therein stated are true to the best of his knowledge, information and belief.

JAMES CRAIG PEACOCK.

Subscribed and sworn to before me this 6th day of January, 1933.

MARGUERITE G. DAVIS, [SEAL.]
Notary Public, D. C.

23 [Stamp:] United States Board of Tax Appeals.
Filed Jan. 23, 1933.

B. T. A. No. 53554.

ESTATE OF RICHARD B. TURNER, Deceased, Petitioner on
Review,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent on
Review,

Statement of Evidence.

The above entitled cause came on for hearing before the United States Board of Tax Appeals on April 27, 1932, James Craig Peacock representing the petitioner and J. M. Morawski representing the respondent. The following is a statement of all of the evidence which is essential to the decision of the questions raised by the assignments of errors set out in the petition for review by this court.

It was stipulated as follows:

"It is stipulated by the parties that the petitioner made the following purchases of United Gas and Improvement Company stock in 1926 on margin through West and Company, brokers of Philadelphia:

Bought March 30, 1926, 100 shares, cost \$9,020.

Bought March 31st, 1926, 500 shares, cost \$44,475.

Bought April 5th, 1926, 100 shares, cost \$9,095.

Bought June 14th, 1926, 400 shares, cost \$43,700.

Bought June 14, 1926, 100 shares, cost \$10,912.50.

On November 22nd, 1926, the petitioner received 300 shares as a 25 per cent stock dividend, making a total held on margin on December 31, 1926, of 1,500 shares.

The petitioner had no marginal transactions in this stock in 1927.

On December 31, 1927, the petitioner's margin account showed 1,500 shares of United Gas and Improvement Company stock long.

It is further stipulated that on June 8th, 1928, the petitioner bought 1,000 shares of United Gas and Improvement stock on margin costing \$143,225.

It is stipulated that the following sales were made on margin of United Gas and Improvement Company stock:

May 8th, 1928, sold 300 shares for \$44,619.

Oct. 22nd, 1928, sold 500 shares of United Gas Improvement Company stock for \$73,865.

November 7th, 1928, sold 500 shares United Gas Improvement Company stock \$74,115, making a total selling price of \$192,599.

It is further stipulated in computing the deficiency the respondent included in petitioner's income for 1928 the sum of \$92,864 representing profit on the sale of 1,300 shares of United Gas and Improvement Company stock in 1928. The profit was computed as follows:

The cost of the 1,300 shares was computed at
 24 \$99,735 by taking the earliest purchases in 1926 together with the 25% stock dividend on each such purchase as follows:

125 shares (100+25)	cost		\$9,020
625 "	(500+125) "		44,475
125 "	(100+25) "		9,095
425 "	"		37,145
1,300 "	"		\$99,735

This last item was computed by taking the cost of the 400 shares bought June 14, 1926 (\$43,700); adding 100 shares received as a stock dividend which would give a total of 500 shares; dividing 500 into the cost of \$43,700 which would give a cost per share of \$87.40; and multiplying this \$87.40 by 425 (the number of shares necessary to make up the total of 1,300 shares) would give a cost of \$37,145 as above. The total cost of \$99,735 computed as above when deducted from the total selling price of \$192,599, leaves a profit of \$92,864."

James L. Rankin, witness for the Petitioner, testified as follows:

Since 1913 I have been the decedent's sole attorney and also secretary of the Turner Supply Company of which he was president and principal owner. I acted also as attorney for his father's estate which was closed and distributed in kind in the spring of 1926. As part of such distribution decedent received about \$20,000 of bonds. Decedent told me that he had decided to open an account with a Philadelphia brokerage house to sell these bonds and use them as the basis for purchasing U. G. I. stock. I recommended West & Company and at his request made the arrangements for opening the account procuring the usual form of marginal agreement which he signed and I returned to West & Company. At his request I directed them to purchase U. G. I. stock and I sent them the \$20,000 of bonds and some cash, I think upwards of \$2,000.

Decedent told me several things in explanation of his instructions, some of which I knew anyhow. He told me of many conversations which he had had with one Thompson who had been associated with him in business and formerly employed by a company which was affiliated with the U. G. I. Company and of the recommendations made by one Morrissey, an engineer in the employ of the U. G. I. Company, that he buy that stock, and that it was those two things that led him to decide to buy U. G. I. stock. "He stated he regarded his purchase, or he wanted to regard the transaction as substituting the U. G. I. stock for the inheritance he received from his father. Mr. Turner did not believe in bonds and said he * * * wanted
25 to change his inheritance from his father from the form of bonds into stock, and desired to purchase

as many shares of stock of the U. G. I. Company as the funds to be obtained from the sale of his bonds would warrant.”

The instructions for these purchases were all given by letter or telephone to a Mr. Carey who was employed with West & Company.

The decedent's very first purchase through West & Company was for 50 shares of U. G. I. stock outright, the certificates for which were delivered to him. His only purchase in that year other than U. G. I. stock was a purchase of 80 shares of Philadelphia Electric. In 1927 his only transactions were the sale of 15 shares of U. G. I. stock which he had received as a stock dividend on the said 50 shares and on 10 other shares which he had received from his father's estate, and a sale of a few shares of the Philadelphia Electric stock. In March, 1928, the situation changed and he began to buy a number of stocks in this account including some additional purchases of U. G. I. stock. On March 14 he bought 1,000 shares of General Motors, and on March 27 he sold 1,000 shares of General Motors. On March 26, he bought 1,000 shares of Packard, and at the end of March, 1928, was long the 1,500 shares of U. G. I. and 1,000 shares of Packard. That was the first change in the account of any consequence. In April he bought 2,000 shares of Public Service of New Jersey. In May he sold 2,000 shares of Public Service of New Jersey, 1,000 shares of Packard, and 300 shares of U. G. I. stock so that at the end of May, 1928, he was long 1,200 shares U. G. I. On June 8, he bought 1,000 shares of U. G. I. on June 11, 400 shares of General Motors, and on June 12, 600 shares of General Motors and 500 shares of Hudson. On July 2 he sold 1,000 shares of General Motors. On July 17 he bought 500 shares of General Motors. On August 9 he bought 500 shares of General Motors and on August 10, 500 shares of Hudson. On August 17, he sold 500 shares of General Motors. On September 6 he
26 bought 500 shares of National Power and Light, on September 10, 500 shares of Consolidated Gas and on September 14, 1,000 shares of Stanley. On September 15 he sold 500 shares of Hudson, on September 25, 500 shares of Hudson, and on September 26, 500 shares of National Power and Light. On September 27 he bought 1,000 shares of Electric Power and Light and 500 shares of

Chrysler, and on September 28 he bought 500 shares of General Motors. On October 8 he bought 500 shares of General Motors and sold 500 shares of Chrysler. On October 19 he bought 500 shares of United States Steel and sold 1,000 shares of General Motors. On October 22 he sold 500 shares of U. G. I. On October 26 he bought 1,000 shares of Studebaker. During November he bought Victor Talking Machine, Sun Oil, Keith-Albee, Shubert, Pennsylvania Railroad, and Curtis stock and sold U. G. I. and Victor stock. On December 10 he sold 8,500 shares in all of Keith-Albee, Curtis, Consolidated Gas, Pennsylvania Railroad, Shubert, Stanley, Studebaker, Victor, and Electric Power and Light. He sold additional shares of General Motors, United States Steel and Victor and bought Victor, Chrysler, A. M. Byers, Packard, Curtis and Kolster Radio stock, so that on December 31, 1928, he was long 1,200 shares of U. G. I., 200 shares of Kolster, and 100 shares each of United States Steel, General Motors, Victor, Chrysler, Packard, Curtis, Sun Oil, and A. M. Byers.

Decedent consulted me about these purchases and sales and during 1928 I many times advised him to sell everything he had. Decedent told me, however, that he was not willing to sell the 1,200 shares of U. G. I. stock which he had purchased in 1926 but he would fix a price at which he would sell the others. He would give instructions that when a stock reached a certain point going up to sell and if it dropped to a certain point to sell. He said he regarded the 1,200 shares of U. G. I. stock as an inheritance from his father. He had sentimental reasons in regard to it and was not interested in its real financial value and regarded it as a permanent investment.

On cross-examination the witness testified as follows:

Decedent never received any certificates. West & Company would send a memorandum with respect to each purchase and sale. He just gave an order to the broker to buy or sell so many shares and received the notice the following day that so many shares were bought or sold.

27 “Q. So far as you were concerned you were not selling any particular shares of the stock? A. Yes, so far as Mr. Turner was concerned, he was selling the 1,000 shares he purchased in 1928. It was never his inten-

tion to change his position with respect to this 1,200 shares he purchased in 1926.

Q. Yes, but wasn't that only a mental thought on his part; did it make any difference whether he was selling the 1,200 shares purchased in 1926 or the 1,000 shares purchased in 1928—he did not have any of the certificates? A. So far as Mr. Turner was concerned and West & Company were concerned they knew his desires and feelings about the 1,200 shares of U. G. I. For myself I had discussed it with Mr. Carey of West & Company, and he knew Mr. Turner's feelings about that, the 1,200 shares."

I never knew in what form West & Company had title to the certificates of stock. They were not in the name of the decedent. The dividends that were declared were received by West & Company and credited to the decedent's account "but from the very beginning West & Company knew Mr. Turner's intentions, and knew he was keeping the first purchase of 1,200 shares."

Until this question was raised by the Government neither decedent nor I knew how West & Company handled these transactions. I went to West & Company two years after the transaction to find out from them a record of the certificates they had representing the original 1,200 shares. I expected they could tell me the number of certain certificates for 1,200 shares and for the first time learned that they could not. They told me that they cleared through a clearing house and always kept or had certificates for exactly the number of shares that all of their customers were long but they could not say that certain certificates or certain numbers were the decedent's. Both decedent and I thought that they had particular certificates which represented the 1,200 shares, the 500 shares, and the other 500 shares and the first we knew that was not so was after the agent had audited decedent's accounts.

"Q. You say that Mr. Turner regarded these shares purchased in 1926 as an inheritance from his father—in other words he had used the money I presume that he got from his father's estate to put up as margins for the purchase of these stocks in 1926? A. Yes, sir.

Q. That would not as a matter of fact make any difference what 1,200 shares he regarded as inheritance from his

28 father, whether at the end of 1928 he still had 1,200 shares reserved in the margin account, so far as his intent was it would have been fulfilled by the holding of any of the shares that were purchased? A. No sir, in Mr. Turner's mind he was so constituted that I know of many instances in our own contact—for instance, there was a certain piece of furniture that was not worth a dollar in his home—he leased his home to a man, and when the man moved out that piece of furniture was not there, and it did not satisfy him to return the value of the furniture. He wanted the particular piece of furniture, and it is in his own mind he had that certain thought that he wanted these particular 1,200 shares.”

When we put in an order to sell we merely said to sell 500 shares. Decedent had in his own mind that it was the 500 shares of the 1,000 shares he had purchased in that year and Mr. Carey knew that decedent felt in his mind that he still had that 1,200 shares. Neither decedent nor I thought it necessary to say anything more for Mr. Carey knew his position, and realized decedent's desires were genuine, and decedent felt it unnecessary to tell him which 1,000 shares he sold.

“Q. It would make no particular difference, so far as he was concerned, he would still have 1,200 shares? A. According to his own idea it would make a material difference, for that 1,200 shares was a different transaction, not to be touched. In other words, it is like two lumps of sugar, they might be the same thing, but one lump might have a particular meaning, and while the second one would not have.

Q. It was mere intention on his part, that is all it amounted to? A. Intention and his own way of bookkeeping, and keeping of the records in his own mind of what he had.

Q. Outside of that it had no substance except what was in his own mind? A. Well, also this he knew at the times of the sale of his own gains and losses for the year for I calculated them and those sales were made, calculated the stocks that were being sold were the stocks purchased in that year, for we made the calculation of what the expense was by way of gain or loss on the sale.”

Very frankly we never dreamed of the possibility that they would regard this as the sale of the earlier purchases.

We got West & Company's statements and calculated all purchases and sales already made to determine whether he should sell more stock or not and we gave no thought at all to the stock bought in 1926 because in his mind and in my mind what he sold was the very same stock that he had purchased in this particular year. About the middle of December, 1928, we made as accurate a calculation as we could at that time of his gross income, and entered his deductions, and based the tax on his expenses and experience up to that time.

29 **Thomas McDougal**, witness for the Petitioner, testified as follows:

I am manager of the Turner Supply Company. Decedent was sick more or less from 1924 and was quite blind from 1928 on and therefore I had to handle a great many of his personal affairs. I had complete knowledge of the marginal account in which U. G. I. was bought and sold. In most of our trips to the doctor we spent the time in a complete discussion of this account. From time to time I would have to get him quotations and check up on his holdings and I conferred with him thoroughly once a week. I knew from many conversations with him about the sales of U. G. I. stock in 1928. He had a very definite idea in his own mind as to what stocks he was selling and what stocks he was keeping and he often discussed with me the difference between his first 1,200 shares and the shares he subsequently bought. In all of my conversations with him he talked about the difference in these holdings.

“Q. Did he explain any distinction in his holdings?”

Mr. Morawski: I object, your Honor. This calls for hearsay testimony.

The Member: Objection overruled.

Mr. Morawski: We note an exception.

The Member: Exception noted.

A. These conversations were all direct from Mr. Turner to me. I being manager of the Turner-Supply Company was very much in close touch to Mr. Thompson, and this U. G. I. proposition in the beginning was discussed from time to time before Mr. Turner bought, and Mr. Thompson had a friend with the Gas Company, Mr. Shaddock, and Mr.

Turner always asked him to get in touch with Mr. Shaddock and that was before he bought, and I know how deeply he went into the U. G. I. problem, and he always thought this U. G. I. was an investment proposition. Then when Mr. Massey came to live at Chester Club, Mr. Turner had a place in Elkton, and Mr. Massey visited with him, quite a good deal, and I used to go down there on Saturday after the day's work was over, and Mr. Turner always had work around the place, and the main part of the conversation was U. G. I.

Q. In 1928 at the time these sales took place, did he then explain any distinction between this original 1,200 shares, and the other stock? A. Yes, sir, he did.

Mr. Morawski: I object to that question, your Honor, on the ground that it calls for hearsay testimony.

The Member: Objection overruled.

Mr. Morawski: We note an exception.

The Member: Exception noted.

A. Always the stock that he bought in 1928 he stated that he bought this stock to deal actively in. He suggested, or he talked to me that this U. G. I. stock that he bought that year was just the same as any other stocks that he bought. He bought with the hopes of making a profit and selling them, but he never relinquished the idea of this original 1,200 shares in all our conversations when we would go over at the end of the month his holdings he expressed that, and there was no doubt in my mind that it was very clear to him the difference between the two classes of the U. G. I. stock he held."

30 At this point witness identified a memorandum in
decedent's handwriting made approximately in
November, 1928, which was admitted in evidence as Exhibit
#1 and pointed out that the third item from the bottom is
the U. G. I. stock. On all of the others he has the word
"sell" which indicates the number of shares he was willing
to sell but on this there is a blank. The 1,200 shares
31 of U. G. I. which he held at that time he did not have
any price on or any intention of selling when he
made this memorandum. I know this because he constantly
made memoranda of this kind to check his holdings. I
know that he did not intend to sell these 1,200 shares.

On cross-examination the witness testified as follows:

In those conversations with decedent he always separated those 1,200 shares and he never talked in any other way than that was the thought in his mind and those shares had nothing to do with the stock he subsequently bought and sold. When he bought these shares he did not actively operate in the market, and he did not actively operate until over a year afterwards and that was a different proposition. He then was sick and had arthritis and was away from his business and had all day to himself and he played the market. He bought and sold these other shares as a profitable pastime. I never saw any certificates of stock.

Approved, settled, and ordered filed this 23rd day of January, 1933.

(S.)

CHARLES P. SMITH,

Member United States Board of Tax Appeals.

32 [Stamp:] United States Board of Tax Appeals,
Filed Jan. 19, 1933.

In the Court of Appeals of the District of Columbia.

B. T. A. Docket No. 53554.

ESTATE OF RICHARD B. TURNER, Deceased, Petitioner on
Review,

v.

COMMISSIONER OF INTERNAL REVENUE, Respondent on
Review.

Præcipe.

To the Clerk of the United States Board of Tax Appeals:

You are requested to prepare and transmit to the Clerk of the Court of Appeals of the District of Columbia a certified copy of the record in the above entitled case, including therein copies of the following:

1. Docket Entries.
2. Petition.
3. Answer.
4. Motion to amend petition and notation that same was granted (see transcript of hearing, page 5).
5. Suggestion of death and motion to substitute and order of April 27, 1932, granting same.
6. Order of September 23, 1932.

7. Order of October 4, 1932.
8. Findings of fact and opinion.
9. Decision.
10. Petition for Review.
11. Statement of Evidence.
12. This præcipe.

JAMES CRAIG PEACOCK,
Attorney for Petitioner.

Service of a copy accepted January 18, 1933.

C. M. CHAREST,
*General Counsel,
Bureau of Internal Revenue,
Attorney for Respondent.*

33 United States Board of Tax Appeals, Washington.
Docket No. 53554.

ESTATE OF RICHARD B. TURNER, Petitioner,
v.

COMMISSIONER OF INTERNAL REVENUE, Respondent.

Certificate.

I, B. D. Gamble, clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 32, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Præcipe in the appeal (or appeals) as above numbered and entitled.

In testimony whereof I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 10th day of February, 1933.

[Seal U. S. Board of Tax Appeals.]

B. D. GAMBLE,
Clerk United States Board of Tax Appeals.

Endorsed on cover: Board of Tax Appeals. No. 5903. Estate of Richard B. Turner, appellant, vs. David Burnet, Commissioner of Internal Revenue. Court of Appeals, District of Columbia. Filed Feb. 14, 1933. Henry W. Hodges, clerk.

SEP 14 1933

Sherry H. Hodge

CLERK

IN THE

Court of Appeals, District of Columbia

No. 5903.

ESTATE OF RICHARD B. TURNER, *Petitioner*,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, *Respondent*.

On Petition for Review of Decision of the
United States Board of Tax Appeals.

BRIEF FOR PETITIONER.

JAMES CRAIG PEACOCK,
Counsel for Petitioner.

INDEX

	Page
Statement of the Case	1
The Facts	2
The Question	4
Specification of Errors	4
The Statute	5
Summary of Argument (with page references) ..	6
Argument	7

TABLE OF CASES.

Ayer v. Blair, 58 App. D. C. 110, 25 F. (2d) 535	
	19, 26, 27
Burnet v. Logan, 283 U. S. 404	40, 42, 43
Embrey v. Jemison, 131 U. S. 336	14, 17
Hoe, R. & Co. v. Commissioner, 30 F. (2d) 630, 634	45
Howbert v. Penrose, 38 F. (2d) 577..	19, 20-24, 25, 26
	27, 38
Hurd v. Taylor, 181 N. Y. 231	12, 14, 17
Kirkland v. Burnet, 61 App. D. C. 88, 57 F. (2d)	
608	41, 42, 43
Maryland Casualty Co. v. United States, 251 U. S.	
342, 349	37
Richardson v. Shaw, 209 U. S. 365	10, 11
Skinner v. Eaton, 45 F. (2d) 568....	19, 25, 27, 28, 37
Snyder v. Commissioner, 54 F. (2d) 57, 58..	10, 19, 27,
	29, 30, 38, 44
Taylor, L. H. & Co.'s Assigned Estate, 192 Pa. 304	
	11, 14, 15
Thomas v. Taggart, 209 U. S. 385	10
Towne v. McElligott, 274 Fed. 960	19, 26
United States v. Alpha Portland Cement Co., 257	
Fed. 432, 434	35
Wagner v. Hildebrand, 187 Pa. 156.....	14, 16
Meyer on "The Law of Stock Brokers and Stock	
Exchanges", Sec. 42	10, 37

IN THE
Court of Appeals, District of Columbia

No. 5903.

ESTATE OF RICHARD B. TURNER, *Petitioner*,

vs.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, *Respondent*.

On Petition for Review of Decision of the
United States Board of Tax Appeals.

BRIEF FOR PETITIONER.

STATEMENT OF THE CASE.

This is a petition for review of a decision of the Board of Tax Appeals which sustained the Commissioner's determination that there was a deficiency of

\$11,173.05 in the income tax liability of Richard B. Turner for the calendar year 1928. Turner died after filing his appeal to the Board but before any hearing thereon, and on April 27, 1932, his estate was substituted as the party petitioner before the Board. This petition was filed under the provisions of Sec. 1002(b) of the Revenue Act of 1926.

THE FACTS.

Early in 1926 Turner, who lived in Chester, Pennsylvania, received \$20,000 in bonds as a partial distribution of his father's estate. He did not believe in bonds as an investment and desired to change this inheritance from his father into stock instead of bonds. At his direction his attorney opened for him a margin account with a Philadelphia broker and with the proceeds of the bonds purchased on margin 1200 shares of United Gas Improvement stock at about 98.

For nearly two years Turner had no further marginal transactions in this or any other stock and took no active part in the market. At the beginning of 1928 his margin account showed 1500 shares of U. G. I. stock long, the additional 300 shares representing a 25 per cent stock dividend credited to him on November 22, 1926.

During 1928 Turner was kept away from his business by serious illness and began to play the market as a pastime. Beginning on March 14, 1928, he bought and sold on margin in this same account a large number of other stocks, practically all in 500, 1000, or 2000 share lots. In November and December of 1928 he became even more active in speculating in smaller lots of a larger number of different stocks.

Included in these speculative transactions of 1928 was a purchase of 1000 shares of U. G. I. stock on June 8, 1928, at about $143\frac{1}{4}$ which, petitioner claims, he sold in two lots of 500 shares each on October 22 and November 7 at about $147\frac{1}{2}$ -148. (On May 8, 1928, he also sold at about 149 the 300 shares of U. G. I. stock which had been received as a stock dividend, but there is no dispute between the parties as to the basis used in computing the profit on this sale. This basis of \$23,440.50 together with the \$143,225 cost of the 1000 shares bought in June of 1928, makes the total basis of \$166,665.50 for the entire 1300 shares as claimed by petitioner.) At the end of 1928 Turner's account was long 1200 shares of U. G. I. stock and 100 or 200 shares each of nine other stocks which had been purchased during the latter part of 1928.

The uncontradicted evidence showed that Turner was extremely sentimental about keeping the original 1200 shares as an inheritance from his father; that he at all times intended to keep those particular shares and to sell in 1928 the 300 shares received as a stock dividend and the 1000 shares purchased in that year; that he fully communicated that intention both to his business associates (who handled his affairs for him during his illness) and to the broker; that his decisions to sell were reached on that basis; that his books and records were kept and his tax return made on that basis; that he at all times and repeatedly emphasized the distinction between the first 1200 shares which he was holding as an investment and the 1000 shares which he bought and sold as a speculation; and that he did everything within his power and control to effect that intention.

The Board, however, sustained the arbitrary ruling of the Commissioner that the 1300 shares sold in 1928 consisted of 1040 shares out of the original 1200 shares plus 260 of the shares received as a stock dividend and that the total basis for computing profit or loss should thus be reduced to \$99,735 and the taxable profit correspondingly increased from \$25,933.50 to \$92,864. This arbitrary method of computing the profit in turn necessitated a very complicated and elaborate and equally arbitrary prorating of the costs of the 1200 shares originally purchased as set forth at R. 12-13.

THE QUESTION.

The principal question is whether the 1000 shares bought in 1928 could be and were identified as the 1000 shares sold later in that year. An affirmative answer would dispose of the entire case and require reversal of the decision below. A negative answer would necessitate the further consideration of several collateral questions as to the operation and effect of Article 58 of Regulations 74 which are presented in Points IV and V.

SPECIFICATION OF ERRORS.

The petitioner urges generally that the Board erred:

1. In holding that the 1000 shares sold in October and November of 1928 could not be identified and in failing to identify them as the 1000 shares bought on June 8, 1928.
2. In holding that the basic cost of the entire 1300 shares sold in 1928 was less than \$166,665.50.
3. In failing to find all the relevant facts.

4. In holding that Article 58 of Regulations 74 is applicable to this case, that it is valid and reasonable as so applied, and that it has been properly applied.

5. In holding that there was any taxable profit whatever on the sale of the said 1000 shares.

The full assignment of errors relied upon is, as required by the rules of this court, set forth in the petition for review and printed at R. 17-19.

THE STATUTE.

The only statutory provision bearing on the present case is Sec. 113(a) of the Revenue Act of 1928 (45 Stat. 818) which is very general in its terms and provides:

“(a) Property acquired after February 28, 1913.—The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property;”

The Commissioner of Internal Revenue has promulgated under the same act a regulation which the Board held applicable in the present case and which provides as follows:

“Art. 58. Sale of stock and rights.—When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots can not be determined, the stock sold shall be charged against the earliest purchases of such stock. The excess of the amount realized on the sale over the cost or other basis of the stock will constitute gain. In the case of stock in respect of which any stock dividend was paid, the basis for determining gain

or loss from a sale of a share of such stock shall be ascertained in accordance with the principles laid down in article 600. * * *"

Article 600 provides rules in detail for prorating the original cost between the stock originally purchased and the stock received as a stock dividend.

SUMMARY OF ARGUMENT.

Preliminary statement. Page 7.

I. The decision below is unsupported by and in direct conflict with the established principles of the law of marginal transactions in stock. Page 10.

(a) Turner was the owner of the 1000 shares bought in 1928 and all the incidents of ownership were in him, including the right to buy for sale on an expected rise and to sell the stock so bought, which right has been completely denied him by the decision below. Page 10.

(b) The decision below denies any effect whatever to the one fundamental factor universally held as determinative of the very legality or illegality of a marginal transaction, viz., the intent of the purchaser. Page 13.

II. The decision below is likewise in direct conflict with the income tax decisions of the Federal courts relative to identification of stock sold. Page 19.

III. The 1000 shares sold in the fall of 1928 were identified as the 1000 shares bought earlier in that year. Page 31.

IV. Even if the shares sold were not identified Article 58 of Regulations 74 is nevertheless inappli-

cable and the profit must be determined under general principles of law. Page 35.

- (a) By its very terms Article 58, which was relied upon by the Board, is inapplicable to the facts of this case. Page 35.
- (b) Article 58 of Regulations 74, even if held to be applicable to the present case, is to that extent unreasonable and invalid. Page 37.
- (c) If for either reason Article 58 cannot be applied and the shares sold are not identified, then the profit must be determined by general principles of law under which there was no profit on sales of these shares until the entire capital investment therein had been recovered. Page 39.

V. Even if Article 58 is applicable it must be strictly applied according to its terms, which has not been done. Page 44.

VI. Conclusion. Page 45.

ARGUMENT.

A preliminary word at the outset as to the theory of the Board's decision should greatly facilitate consideration and decision of the case as presented to this court. The Commissioner's position in this case has been that stock can be identified solely by certificate numbers, that this is the only kind of evidence of identification that can be considered, and that if stock sold cannot be identified by this exclusive method it must be arbitrarily presumed to have been the earliest purchased stock of that kind. That the Board sustained this position without modification is clearly shown

by its opinion (R. 13-15). That it appreciated the full import of its decision is not, however, indicated by its opinion. On the contrary the briefness of its opinion very clearly indicates that it did not. This is the first reported case in which this question has squarely arisen as to whether a purchaser of stock on margin who sells less than his total holdings in a given stock can select the stock which he sells. The Board's decision held not merely that the particular stock sold had not been identified. It went much further. The very briefness of its decision was tantamount to a decision that one in Turner's position is legally powerless to select what stock he should sell.

Such a startling result by its very nature necessarily casts much doubt upon the soundness of the decision which produces it. To be specific. Turner at all times wanted to and intended to sell the 1000 shares purchased in 1928. He fully communicated that intent to his business associates who acted as his agents and through them to the brokers. It was on that basis that he decided what he would sell, and obviously his decision might have been very different if he had had any reason to suppose that it might cost him an additional \$11,000 in taxes to sell that stock. It was on that basis that he kept his records and made his tax return. In short he had a purpose and intent which was entirely legitimate, and he did everything within his power and control to carry it out. The Board held that he had not succeeded in so doing for the sole reason that he had not earmarked and thus identified the certificates sold—a thing which is impossible to one who holds stocks on margin. In other words it held that he had not suc-

ceeded in selling the particular shares which he intended to sell because from the very nature of such marginal transactions it was both physically and legally impossible for him to identify them by that particular method. Thus in effect it held that it was both physically and legally impossible for him to sell the particular shares which he desired to sell. On its very face such a decision suggests its own unsoundness. *The Revenue Acts say nothing about earmarking and identifying stock certificates, and in the absence of any such specific provision in the taxing statutes the latter should be presumed to incorporate and follow the general law and the ordinary custom of business.*

We will see that the general law on the subject is so well established to the effect that a purchaser of stock on margin is the owner thereof and entitled to the benefit of all incidents of such ownership that the unsoundness of the decision below will shout out aloud. We will see too that the decisions of the Federal courts, including those cited by the Board, neither require nor permit the extreme result reached below but on the contrary support rather than conflict with our position. We will see that the shares sold were identified in fact as well as in law. And finally we will see that even if there could be any doubt about the identification in this case there must in any event be considerable modification of the arbitrary rule of thumb which was applied by the Commissioner and sustained by the Board.

I. The decision below is unsupported by and in direct conflict with the established principles of the law of marginal transactions in stock.

(a) Turner was the owner of the 1000 shares bought in 1928 and all the incidents of ownership were in him, including the right to buy for sale on an expected rise and to sell the stock so bought, which right has been completely denied him by the decision below.

The speculative purchase and sale of stocks on margin is very familiar to the law. It has given rise to many reported cases by which the status and the rights of the parties have long since become well established. That a purchaser of stock on margin is the owner of the stock—and more particularly that Turner was the owner of the 1000 shares bought in 1928—and that as such owner he is entitled to the benefit of all the incidents of ownership is established beyond question. *Richardson v. Shaw*, 209 U. S. 365; *Thomas v. Taggart*, 209 U. S. 385; *Snyder v. Commissioner of Internal Revenue*, 54 F. (2d) 57, 58; Meyer on "The Law of Stock Brokers and Stock Exchanges," Sec. 42.

The law on this subject is well summarized with exhaustive citations in the section just quoted from Meyer—

"The customer is the owner of the securities which are purchased by the broker on his behalf. This is true even though the purchase is made on margin. It is the judgment of the customer which determines when the securities are to be purchased and when they are to be sold. All of the incidents of ownership are in the customer. The risk of the purchase is his, and the broker, aside from his remuneration, has no interest therein. The profits of the transaction are the customer's,

and the losses must be sustained by him. Dividends and stock rights belong solely to him.’’

The *Richardson* case is probably the leading case on this subject. The precise question was whether there had been a preference in violation of the bankruptcy act where an insolvent broker a few days before his bankruptcy and on full settlement by a customer had delivered to the latter stock which had been bought and held on margin. The determining factor was whether the purchaser or the broker had been the owner of the stock while it was held on margin. The Supreme Court reviewed the authorities exhaustively and reached the conclusion that with the possible exception of Massachusetts the principle that in marginal transactions the purchaser and not the broker is the owner of the stock had become such a settled rule of law that it must be concluded that the purchaser is the *owner* of the stock. The court went even further and pointed out how the various incidents of ownership also rest in the purchaser and that the broker is nothing more than a pledgee with certain specific rights under the customary contract in such cases.

That the right to sell is one of the most elementary “incidents of ownership” is axiomatic. Turner was the owner of the particular 1000 shares which he purchased in 1928 and as such he had the right to sell them when and under such conditions as he saw fit. This right is expressly contemplated in the cases. The present transaction took place in Pennsylvania and we quote at this point briefly from a leading Pennsylvania case, *L. H. Taylor & Co.’s Assigned Estate*, 192 Pa. 304, from which we quote more fully at a later page. In the *Taylor* case the Supreme Court of Pennsylvania said—

“stocks are as legitimate subjects of speculative buying and selling as flour or dry goods or pig iron. A man may buy any commodity, stock included, *to sell on an expected rise* * * *.”

To the same effect is the leading New York case *Hurd v. Taylor*, 181 N. Y. 231, from which we also quote more fully on a later page. There the Court of Appeals of New York held—

“The purchase of stocks through a broker, though the party ordering such purchases does not intend to hold the stocks as an investment, but expects the broker to carry them with the design on the part of the purchaser to sell again these stocks when their market value has enhanced is, however speculative, entirely legal * * *.”

It is thus apparent that Turner had the absolute right to do exactly what he did, and the right being absolute it could not possibly have been either limited or completely abrogated—as the Board in effect held—by the mere fact that two years earlier he had bought some of the same stock as a permanent investment. He had the absolute right to buy these 1000 shares in the spring of 1928 at about 143¼ with the purpose of selling them when the prices advanced, and to so sell them as he did when the prices advanced to about 147½ or 148. He carried out all the steps necessary to effect that sale because he did everything that was either physically or legally possible for him to do in the premises. The mechanics of buying stock on margin has long been well known to the courts. It is referred to and contemplated in the cases cited. The courts have recognized all along that in such cases cer-

tificates are never earmarked for particular purchases, but that the broker is entitled to commingle them and to hold them in various names, etc., frequently known as street certificates. The Supreme Court in the *Richardson* case constantly referred to these conditions in the very opinion in which it held the purchaser was the owner and in which it supported its decision by reference to the various incidents of ownership which rested in him.

But if Turner was the owner of these particular 1000 shares, which he had purchased with the idea of selling on a rise, and if as an owner he was entitled to sell them when they did rise, there must necessarily be something wrong with a decision such as that below which in effect held that he could not so sell them. It conflicts with and is right in the face of the established principles of law relating to the nature of marginal transactions and the status of the parties thereto. It reads into the law something that is not there and which under the decisions cannot be implied. Nor is there either occasion or reason for the identification of the thing purchased being required to go further than the identification of the thing sold. The latter has been identified by the taxing authorities solely from Turner's intent and his books and records and his tax return. The former may very properly be identified in the same way, especially when such identification is the only kind which accords with the cases which we have just considered relative to the status of the parties to marginal transactions as well as with the cases which we are now about to consider relative to the legality of such transactions.

(b) The decision below denies any effect whatever to the one fundamental factor universally held as de-

terminative of the very legality or illegality of a marginal transaction, viz., the intent of the purchaser.

A speculative purchase of stock on margin is entirely legal. This form of transaction, however, is so easily capable of abuse, particularly through what have come to be known as "bucket-shops," that the courts early had to develop a definite test to determine the legality of marginal transactions. It is most significant that the one test which has thus been universally developed by the courts to distinguish between a perfectly legal although speculative purchase of stock on margin, as in the present case, and a mere bucket-shop transaction is the *intent* of the parties and particularly the intent of the purchaser. *L. H. Taylor & Co's Assigned Estate*, 192 Pa. 304; *Wagner v. Hildebrand*, 187 Pa. 156; *Hurd v. Taylor*, 181 N. Y. 231; *Embrey v. Jemison*, 131 U. S. 336.

If then intent is the major and practically the sole factor in determining the legality or illegality of such a transaction, surely one who like Turner embarks on such an undertaking is entitled to have at least some weight given to that same intent in considering the purely subordinate and collateral question of what particular stock was bought or sold in the transaction whose legality has just been established solely by the test of intent. Turner's speculative purchase on margin of 1000 shares in June of 1928 in the hope that he could sell the stock at an enhanced price was legal because he intended that the broker should actually make such a purchase as he in fact did. Surely by the same token Turner may resort to that same intent to prove what stock he sold in completing the very transaction the legality of which has been es-

tablished in the way just mentioned, and the Board erred therefore in refusing to give any effect whatever to that factor.

In the *Taylor* case the question arose on a customer's claim against an insolvent broker for long purchases on margin. The lower court disallowed the claim as a gambling transaction. The Supreme Court of Pennsylvania (the state in which all the transactions here in question took place) reversed this decision because the various stocks had been bought and sold as ordered by the customer and he testified that such had always been his intent. The court said at page 306—

“It has been settled by this Court so often that it ought not to require reiteration that dealing in stocks even on margin is not gambling. Stocks are as legitimate subjects of speculative buying and selling as flour or dry goods or pig iron. A man may buy any commodity, stock included, to sell on an expected rise, or sell ‘short’ to acquire and deliver on an expected fall, and it will not be gambling. Margin is nothing but security, and a man may buy on credit, with security or without, or on borrowed money, and the money may be borrowed from his broker as well as from a third person. The test is, did he *intend* to buy, or only to settle on differences? * * * The true line of distinction was laid down in *Peters v. Grim*, 149 Pa. 163, and has not been departed from or varied, ‘A purchase of stock for speculation even when done merely on margin, is not necessarily a gambling transaction. If one buys stock from A and borrows the money from B to pay for it, there is no element of gambling in the operation, though he pledges the stock with B as security for the money. So, if instead of borrow-

ing the money from B, a third person, he borrows it from A, or, in the language of brokers, procures A to "carry" the stock for him, with or without margin, the transaction is not necessarily different in character. But in this latter case, there being no transfer or delivery of the stock, the doubt arises whether the parties *intended* there should ever be a purchase or delivery at all. *Here is the dividing line.* If there was not under any circumstances to be a delivery, as part of and completing a purchase, then the transaction was a mere wager on the rise and fall of prices, but if there was in good faith a purchase, then the delivery might be postponed, or made to depend on a future condition, and the stock carried on margin or otherwise in the meanwhile without affecting legality of the operation.' This rule has been uniformly followed."

In the *Wagner* case a broker sued a customer. The same court announced the same rule in even more terse words at page 141—

"A purchase of stock on margin for speculation is not necessarily a gambling transaction. If it is the *intention* of the parties that a real purchase shall be made by the broker, although the delivery may be postponed or made to depend upon future conditions, the transaction is legal; if it is the *intention* that there is not to be a delivery to complete the purchase, but that the account is to be settled on the basis of a rise or fall in prices, it is a mere wager, and the contract cannot be enforced by either party."

and sustained a judgment for the defendant because the evidence tended

"to sustain the averment that no real purchase or sale was ever *contemplated*."

To the same effect is the leading New York case of *Hurd v. Taylor*, 181 N. Y. 231. A broker sued a customer, and the Court of Appeals held that the trial court erred in refusing defendant's request to dismiss the complaint because plaintiff's testimony showed that "the parties did not *contemplate* an actual purchase of stocks." The court said at page 233—

"The law of this state as to the purchase and sale of stocks is well settled. The purchase of stocks through a broker, though the party ordering such purchases does not *intend* to hold the stocks as an investment, but expects the broker to carry them with the *design* on the part of the purchaser to sell again the stocks when their market value has enhanced is, however, speculative, entirely legal. * * * But to make such transactions legal they must *contemplate* an actual purchase * * * of stocks by the broker, or through him."

In the *Embrey* case the Supreme Court of the United States held void a contract with a broker to purchase cotton futures on margin because neither party contemplated the purchase or delivery of actual cotton but only the settlement of the difference through a payment by one party to another. The court said:

"Whether the validity of the original contract for the purchase of future-delivery cotton must depend upon the New York statute or upon the Virginia statute, it is not important to determine; for, if such contract, as alleged, is a wagering contract, it is void under the law of either State. The plea makes a case of money advanced by the plaintiff's firm solely for the purpose of carrying 'cotton futures,' for which he or they contracted.

when, according to the averments of the rejected plea, neither party *contemplated* the purchase or delivery in fact of cotton, and when it was *understood* that any settlement, in respect to such purchases, should be exclusively upon the basis of one party paying to the other only 'the difference between the contract price and the market price of said cotton futures, according to the fluctuations of the market.' If this be not a wagering contract, under the guise of a contract of sale, it would be difficult to imagine one that would be of that character. The mere form of the transaction is of little consequence. If it were, the statute against wagers could easily be evaded. *The essential inquiry in every case is as to the necessary effect of the contract and the real intention of the parties.* Mr. Benjamin, in his *Treatise on Sales* (Vol. 2, 6th Am. ed. by Corbin, p. 716, Sec. 828), after stating that at common law wagers that did not violate any rule of public decency or morality, or any reorganized principle of public policy, were not prohibited, says: 'It has already been shown that a contract for the sale of goods to be delivered at a future day is valid, even though the seller has not the goods, nor any other means of getting them than to go into the market and buy them.' 'But such a contract,' he proceeds to say 'is only valid where the parties really *intend* and agree that the goods are to be delivered to the seller, and the price to be paid by the buyer.' "

We submit therefore that intent is a factor which cannot be ignored where the sole question is that of identification of the stock sold, and that the Board committed serious error when it refused to give any effect to the evidence as to Turner's intent, and that it likewise committed gross error when it denied to

him as owner of those particular 1000 shares that elementary right of all owners to sell their property when and as they see fit.

II. The decision below is likewise in direct conflict with the income tax decisions of the Federal courts relative to identification of stock sold.

So far we have dealt only with the applicability of general principles of law to the facts of this case. Under this point we turn our attention to the decisions of the Federal courts which relate to this very subject of determining profit on the sale of stock for income tax purposes and thus are even more particularly in point.

One need only look at these decisions from this standpoint of intent to find that on the one hand they conform to the cases which we have just considered under the preceding point and on the other hand they in no instance justify the adoption of earmarking of certificate numbers as the sole and exclusive test of identification. *Howbert v. Penrose*, 38 F. (2d) 577; *Towne v. McElligott*, 274 Fed. 960; *Ayer v. Blair*, 58 App. D. C. 110, 25 F. (2d) 535; and cf. *Skinner v. Eaton*, 45 F. (2d) 568, and *Snyder v. Commissioner*, 54 F. (2d) 570. The decision below sticks out like the proverbial sore thumb as being all out of line when compared with these cases. This is true as we will see later on in this point even with regard to the *Skinner* and the *Snyder* cases which were relied upon but in our judgment misconstrued and misapplied by the Board in its opinion in the case at bar.

The leading case on this subject is a decision of the Circuit Court of Appeals for the Tenth Circuit in the

Penrose case from which we quote at length, the facts appearing in the opinion—

“It seems that the plaintiff owned a large number of shares in the three copper companies which he acquired prior to 1913. He was one of the founder of the business, *and he intended to keep these holdings as long as he lived*. The certificates representing these shares were deposited for safekeeping with the Columbia Trust Company of New York City. In 1916 and 1917 he bought 2,000 additional shares in the Chino, 2,350 shares in the Ray Consolidated, and 1,000 shares in the Utah companies, on the market. For them he paid \$268,981.25. The certificates representing these shares were delivered to the Columbia Trust Company, for safekeeping, *and were commingled with the old certificates*.

In 1918, plaintiff decided to sell the stock acquired in 1916 and 1917, one of the reasons being to enable him to deduct a loss in his 1918 return. He sold *the exact number* of shares purchased in 1916 and 1917, at an actual loss of \$54,030.75. That such was the stock sold is *evidenced by the books of his office, and also a pocket memorandum kept by himself*. These sales were effected, as were the purchases, through the Colorado Springs office of a broker of the New York Stock Exchange. Delivery by the selling broker was effected by an order on the Columbia Trust Company. An employee of the Trust Company delivered, in most instances, certificates of the original stock owned by plaintiff, and not the certificates deposited in 1916 and 1917. The government declined to allow the loss incurred, but on the contrary charged plaintiff with a profit of \$47,350.50, measured by the difference between the 1918 sale price and the 1913 value of the stock.

(1) *The trial court found as a fact from the*

evidence, that *'Plaintiff intended to and did sell' the shares acquired in 1916 and 1917. This finding is supported by the evidence, and cannot be disturbed. Dooley v. Passe, 180 U. S. 126, 21 S. Ct. 329, 45 L. Ed. 457; Stanley v. Supervisor of Albany County, 121 U. S. 533, 7 S. Ct. 1234, 30 L. Ed. 1000. The trial court, likewise found—*

'It has since been ascertained that in the case of many such sales, the certificates so delivered by said depository were certificates held by plaintiff on March 1, 1913, and in other cases plaintiff is unable to identify the certificates delivered by the depository on such sales, as those received by it on the purchases above found. In one case only, does the proof show that the certificates delivered on a sale were those actually received by the depository on a purchase above found.'

The contention of the collector is that the certificates delivered are conclusive as to the identity of the stock sold. Upon this, the trial court, in a memorandum opinion said:

'Where a party has held stock for many years, and later buys more, and in this case it is admitted that plaintiff bought a great deal more after 1913 than he sold in 1918, he has a right to decide which stock he is going to sell. The Government has not the power to say that if the taxpayer sells any of his holdings in a particular company, it can say conclusively that he sold the stock bought at the cheapest price or the shares purchased before or after a certain date. He has the right to decide that himself.'

(2) In our opinion, proof of the certificates delivered does not conclusively determine what transaction did in fact take place. It is evidence,

but not exclusive evidence. So it is of the question of intent of the seller, a point much labored at the trial and here; it is some evidence as to what was done, but not conclusive. The ultimate question is, What was done? It was, and must be, readily conceded that if there had been a written contract of the sale of this stock, specifying 'the shares purchased by me in 1916', and a clerk in the office of a trust company had delivered certificates acquired at an earlier date, the 'identity of the lot' could be and would be determined by the contract. There being no applicable statute of frauds, the finding of the trial court, upon ample evidence, identifies the lot as well as a written contract. In the case at bar, the sale was consummated on the floor of the New York Stock Exchange. The plaintiff's broker, for the plaintiff, offered for sale a block of shares he purchased in 1916. True, the broker did no more than offer '1,000 shares of Chino Copper,' but the finding is that this '1,000 shares of Chino Copper' was 'the lot' acquired in 1916. Another broker accepted the offer for his customer. Neither the buying broker nor the customer knew or cared what 'lot' was offered. A binding contract was made upon such acceptance, and legal results would flow from it, if no certificates were ever delivered. In *re Columbus Buggy Co.* (8 C. C. A.) 143 F. 859.

We are saved any inquiry into the abstruse question as to the exact quality of the transaction. In a very true sense, a stockholder of a corporation is an owner of an undivided interest in the properties of the corporation. The purchase of additional shares increases that ownership. When he sells shares, his ownership is lessened, and theoretically it might be difficult to identify the portion sold either as that acquired in 1916, as plaintiff claims, or that owned in 1913, as the defendant claims. *But the tax laws are*

practical; consideration is given to the fact that men do buy stock in various lots and sell them in the same way. Judge Learned Hand has said, on this point:

‘The plaintiff answers this argument by saying that, if so, all shares at any time held by a stockholder must be brought into hotchpot and averaged. I scarcely think that consistency requires me to go so far. The law may, and in fact does, recognize an identity in every share, which can indeed be traced upon the books of the company, at least until certificates are consolidated, and later subdivided. The purchase of a number of shares can be earmarked by the certificate, and it is an enormous convenience to keep the purchases separate.’ *Towne v. McElligott* (D. C.), 274 F. 960, 963.

(3) A theoretical plan might have been devised, by which an average cost or March 1, 1913, value of all shares owned should be ascertained as a starting point from which to figure profit or loss on sales. But the government adopted a more practicable method, and it is incorporated in Regulations 45, Article 39, which reads:

‘When shares of stock in a corporation are sold from lots purchased at different times and at different prices and the identity of the lots cannot be determined the stock sold shall be charged against the earliest purchases of such stock. The excess of the amount realized on the sale over the cost of the stock, or its fair market values as of March 1, 1913, if purchased before that date, will be the profit to be accounted for as income.’

Both parties agree that the regulation is a valid one, and it answers this law suit. The trial

court has found, on sufficient evidence, that the 'identity of the lots' can be and has been determined. *This finding cannot be overturned because one piece of evidence—the certificates delivered—is to the contrary.* Cases holding that a situs for the purpose of taxation may be acquired by the location of the certificates do not persuade. *Safe Deposit & Trust Co. v. Virginia*, 280 U. S. 83, 50 S. Ct. 59, 74 L. Ed.—; *Wheeler v. Sohmer*, 233 U. S. 434, 34 S. Ct. 607, 58 L. Ed. 1030; *De Ganay v. Lederer*, 250 U. S. 376, 39 S. Ct. 524, 63 L. Ed. 1042; *Maguire v. Trefry*, 253 U. S. 12, 40 S. Ct. 417, 64 L. Ed. 739; *Crichton v. Wingfield*, 258 U. S. 66, 42 S. Ct. 229, 66 L. Ed. 467. *That certificates of stock are but evidence of ownership, and that the ownership follows the owner, and not the certificates, is still a settled principal of our law.* *Blodgett v. Silberman*, 277 U. S. 1, 9, 48 S. Ct. 410, 413, 72 L. Ed. 749, and cases therein cited."

It will be noted that the *Penrose* case conforms in all respects with the general principles developed in Point I, and that it is not merely consistent with our position but affirmatively supports it in every respect. Indeed the cases are very parallel in all respects except that there the purchases were outright while here they were on margin. In one way, however, that difference makes the present case even a stronger one in the taxpayer's favor than the *Penrose* case because Turner through his agents did everything that was either physically or legally possible to carry out his intent whereas it was Penrose's own agents who slipped up somewhere along the line and actually delivered the wrong certificates. In the *Penrose* case the trial court received and gave effect to evidence as to intent and this action was approved by the appel-

late court. Both courts weighed the evidence of the certificate numbers on the one hand against all the other evidence including intent on the other hand. They gave effect to the latter evidence as against the former evidence. They did exactly what the Board refused to do in the present case. They decided as a matter of law that intent was relevant evidence which should be considered, and they likewise decided as a matter of law that earmarking of certificates was not the sole and exclusive method by which stock bought and sold might be identified. The trial court found that the taxpayer "did sell" stock other than that for which the certificates were delivered. The appellate court affirmed the judgment on that finding, and thus held not merely that proof of certificate numbers is not the sole and exclusive method of identification, but that on the contrary stock may be identified in spite of the certificate numbers. The *Penrose* case is not only an authority which should be given serious consideration by this court because it is a decision of a high federal court. It is an authority which should be followed by this court because it is sound in its reasoning, it conforms with the established principles of general law, and it adopts the only fair and practical method of determining such a question as that in the present case.

Although the *Penrose* case was urged at length upon the Board the latter failed to even mention it in its opinion, thus almost confessing that it could not distinguish it. The *Penrose* case has never been overruled or seriously questioned. Neither has any court declined to follow it. Indeed it is most significant that in *Skinner v. Eaton*, 45 F. (2d) 568, relied upon by the

Board in its decision below at R. 15, the Circuit Court of Appeals for the Second Circuit itself cited the *Penrose* case with approval at page 570. We submit therefore that the decision below might well and in fact should be reversed on the authority of the *Penrose* case alone.

But that is not the only helpful decision in the Federal courts. In the early case of *Towne v. McElligott*, 274 Fed. 960, the question was a slightly different one arising out of the sale of stock on which a stock dividend had been declared. It is true that in the decision handed down by Judge Learned Hand the principle of charging the sale to the earliest purchases was applied, but in a single sentence from his opinion at page 963 where he justifies his action Judge Hand makes it clear that intent cannot be ignored and that he is only deciding that way because of lack of proof of intent—

“The most natural analogy is with payment upon an open account, where the law has always allocated the earlier payments to the earlier debts, *in the absence of a contrary intention.*”

The decision of this court in *Ayer v. Blair*, 58 App. D. C. 110, 25 F. (2d) 534, likewise supports our position when approached from the other standpoint of whether earmarked certificates can be held to be the sole and exclusive method of identification. In that case the taxpayer had proved the sale of specific earmarked certificates identified by their number and sought to compute profit on the basis of the cost of the stock represented by those particular certificates. The Board in that case refused to give effect to the proof of the certificates but insisted on prorating the cost of those shares and other shares which had been pur-

chased under rights issued on the original shares. This court sustained the Board, ruling at page 535:

“The parties were not dealing with mere paper certificates but with proportionate interests in the ownership of the bank.”

While it is true the question there came up under a different set of facts, in both cases shares of stock were sold and the question was as to what original purchases were to be matched off with the shares sold. If complete proof of the identical certificates had to be entirely disregarded in that case, surely it cannot be given full and exclusive effect in the present case to the exclusion of all other evidence of identification. The answer is an obvious one. Proof of earmarked certificate numbers is neither an absolutely essential nor an absolutely conclusive identification of the stock sold. It may be evidence but it is not conclusive evidence. The *Penrose* case expressly so held. Both the decision in that case and the decision of this court in the *Ayer* case clearly indicate the true principle, and we ask that that principle be applied to the present case.

The Board in its opinion at R. 14-15 cited only two cases, the decisions of the Circuit Court of Appeals for the Second and Third Circuits, respectively, in *Skinner v. Eaton*, 45 F. (2d) 568, and *Snyder v. Commissioner*, 54 F. (2d) 570. It seemed to think that those cases required it to hold that no weight whatever could be given to intent and that proof or lack of proof of certificate numbers was conclusive. They did nothing of the sort. In both of those cases the courts applied principles which satisfied the particular needs of the cases, and which at the same time were not incon-

sistent with the authorities which we have cited in this and the preceding point. There is nothing in either of those cases which requires either the theory or the decision announced by the Board in the present case.

In the *Skinner* case the earliest of the several sales in question was in 1917 whereas the only proof of the alleged intent of the taxpayer to retain his original holdings were statements alleged to have been made by him in 1914 and 1915 and testified to by his associates after his death. That is a very different case from the present one where the statements were contemporaneous with the transactions and were made not merely to associates but to the very associates who acted as his agents in carrying out the sales, and were also corroborated by all the surrounding circumstances. Moreover in the *Skinner* case the court merely held that the testimony as to these declarations several years earlier was "insufficient to change the result". That falls far short of being an authority that proof of contemporaneous intent as in the present case cannot be considered. Indeed in the very next sentence in the opinion in the *Skinner* case the court said that the declarations of the taxpayer in that case "indicate merely a purpose which he may not have adhered to."

The *Skinner* case was decided on the facts of the particular case, and if it has any bearing on the present case at all it is that the court did consider the possibility of evidence as to intent being relevant and ignored it only because of its remoteness in point of time, thus in effect impliedly conceding its possible relevancy. It thus appears that the case is perhaps more of an authority for us than against us. In any event it can have little weight as an authority against us.

That decision is also distinguishable upon another ground. The shares in that case were not purchased upon margin. The taxpayer had full control of the certificates but kept no record of the certificate numbers and permitted them to become mixed up. In other words he did not do all that he could have done to preserve evidence of identity, whereas in the present case Turner did everything that he could have done. A decision giving considerable effect to earmarking of certificate numbers where that was easily possible certainly cannot be a final authority requiring identification exclusively in that way in a case where from the very nature of the transaction such earmarking was both physically and legally impossible.

So also with regard to the *Snyder* case, which incidentally appears to be the only income tax decision relative to a sale of stock held on margin. There the court even more expressly implied that intent, where it can be proved, should be given due weight and consideration as appears from the following quotations from the opinion at page 58—

“True, the testimony was not contradicted, yet we cannot find that it discloses the requisite identification. What happened in each account was that the broker, watching the petitioner’s margin balance in relation to the minute to minute fluctuations of the market, gauged the account by keeping his eye on the most recent purchases and when a comparison of their figures with the tape showed the margin growing thin, he would sell enough shares to revive it. The broker thought, as he testified, he was selling the shares of the last purchases, though in no way earmarked or allocated. In other words, he conceived ‘from the technique of Mr. Snyder’s operations’—overloading the ac-

count—he was in each instance selling the shares latest purchased because it was those shares that, on a falling market, had embarrassed the account. Stated differently: But for the last purchases the account would not be embarrassed, therefore the broker sold what he thought were the offending shares, although a sale of shares purchased earlier would have restored the account just the same. This was a purely mental operation of the broker, or, as he himself testified, ‘a mental condition entirely,’ which falls short of evidential ‘identification.’ As this was all the evidence of identification in the case, it left the regulation, ‘First in, first out,’ in force and justified the determination of a deficiency tax.”

There, as appears from the above quotation, the facts were very different. Not only was there no proof of intent on the part of the taxpayer to sell any specific shares or lots of shares but the proof showed that on the contrary he apparently did not have any such intent. The only evidence was that of the broker and at that it was only of his own afterthought. This is no authority that evidence of intent, when properly introduced as in the present case, must be ignored. On the contrary the extent to which the court considered it establishes if anything just the opposite. Note especially the opening sentence of the quotation that while the testimony of the broker was not contradicted “yet we cannot find that it discloses the requisite identification,” and the conclusion near the end of the quotation that a purely mental operation of the broker “falls short of evidential identification.” We have no dispute with the *Snyder* case. Indeed we recommend a thorough perusal of that case by this court for we cannot conceive that the opinion in that case is consistent

with any other supposition than that evidence of intent is relevant and should be considered. All that that case holds is that a mental afterthought on the part of the broker is not sufficient proof of an intent of both the parties and is not in itself sufficient proof of identification of the shares sold.

We submit therefore that the income tax decisions of the Federal courts uniformly support the true principle which might be phrased somewhat to the following effect: Certificate numbers, intent of the taxpayer, his books and records, the way he handled the matter on his income tax return, and corroborative circumstances of various kinds, are all relevant evidence on a question of identifying the stocks sold, and that no one of these kinds of evidence is necessarily conclusive to the exclusion of any other. We submit that application of this principle to the record in the present case will necessitate reversal of the decision below as is more fully developed in the following point.

III. The 1000 shares sold in the fall of 1928 were identified as the 1000 shares bought earlier in that year.

Turning now to the facts of the present case we find that while the Board's findings are fairly complete they are limited in much the same way as its opinion and omit certain facts which have a bearing on the ultimate question of which stock was sold. The statement of *all* the evidence is short and consists of only seven printed pages of the record (R. 22-29), and it is hoped that this court will read it through.* We summarize it, however, briefly at this point. The witnesses

*Note: The several respects in which the Board's findings of fact are incomplete or not strictly accurate are fully covered by our assignments of error numbered 11-16, inclusive, printed in full at R. 17-19.

were two in number, Turner himself having died before the hearing (R. 2, 9). One was Turner's personal attorney who on account of his illness opened the account and transmitted practically all of the instructions to the broker under Turner's direction. The other was the general manager of the business of which Turner was the head and principal owner. This witness was constantly associated with him and testified as to his repeated discussions and conferences about this particular stock.

The evidence was as follows: Early in 1926 Turner received in the distribution of his father's estate \$20,000 in bonds (R. 22). He did not believe in bonds and wanted to change this inheritance from his father into stock (R. 22). He became very much interested in the U. G. I. Company of Philadelphia and instructed his attorney to open a margin account with a Philadelphia broker and buy as much U. G. I. stock as he could with the proceeds of the bonds (R. 22-23). In this way 1200 shares were purchased early in 1926 at about 98 (see R. 21). It was not until nearly two years later that Turner had any other marginal transactions in this or any other stock (R. 23). He continued to hold the original 1200 shares and was still holding them and intending to hold them at the end of 1928, the taxable year in question (R. 24). He constantly and frequently both before, at the time of, and after the sale of the other 1000 shares in October and November, 1928, reiterated his purpose and intent to keep the original 1200 shares as the inheritance from his father (R. 24-26, 27-29). He was quite sentimental in this and similar respects as illustrated by a similar instance of a piece of furniture which disappeared while his home was leased and as to which he was satis-

fied only by the return of the particular piece of furniture and not merely of its value (R. 25-26). He kept his records all along on the basis of always retaining the original 1200 shares and selling in the fall of 1928 an entirely different 1000 shares which he had just recently purchased in June of that year (R. 26-27, 28). He reached his decision to sell on that basis, and he made his tax return on that basis (R. 24, 26, 27, 28). Both lots of stock having been bought on margin he could not from the nature of things have physical custody and control of the certificates, but he saw to it that the broker was kept fully informed as to which shares he was keeping and which shares he was selling (R. 25).

There is also one set of corroborating circumstances which are entirely ignored in the Board's findings but which tend to strongly confirm the fact that the 1000 shares sold in the fall of 1928 were those which had been purchased in June of that year. The original purchase of 1200 shares in the spring of 1926 was apparently his first experience with a marginal account. In any event the record does show that for two years thereafter he did not buy any more of this or any other stock on margin (R. 21, 23). It was not until March, 1928, nearly two years later, when his illness was such that he was confined to his home that he began to play the market (R. 23, 29). During the eight months from March to October of 1928, however, he made eighteen purchases on margin of twelve different stocks, in lots ranging from 400 to 2000 shares apiece, and during that period he sold most of those purchases presumably at normal advances as is ordinarily the case when one speculates on margin (R. 23-24). The purchase of 1000 shares of U. G. I. stock in June of that year at

about 143 $\frac{1}{4}$ was just one of these eighteen transactions, and as in the other cases it was sold four or five months later at a substantial profit of nearly \$5,000 which was duly recorded in his books and reported in his tax return (R. 21, 23-24, 27). Thus this purchase and sale of 1000 shares of U. G. I. stock which is here in question was not even an isolated transaction. It was in fact just one of some eighteen speculative transactions in which he engaged during a few months in 1928 while he was confined to his home because of illness. The evidence as to these transactions will be found particularly at R. 23-24. Circumstances there set forth very strongly corroborate the other evidence as to which shares were sold. Having always kept and intended to keep the original 1200 shares, and after having in 1928 sold the 300 shares which had been received as a stock dividend on the original 1200 shares, he later in that year bought, along with some seventeen other similar purchases, 1000 more shares of that stock—to use the words of the Supreme Court of Pennsylvania “to sell on an expected rise”—and in due course sold them again when they showed a substantial profit of nearly \$5,000.

Many a murderer has been sent to the gallows on circumstantial evidence far less convincing and far less corroborative than the evidence which we have just considered. We have seen in the preceding points that Turner was the owner of those 1000 shares purchased in June of 1928 and that the incidents of ownership, including the right to sell the property, vested in him. We have seen from the evidence that he had a definite, intelligent, and fully expressed purpose and intent to sell that stock, and that he did everything within his power to carry out that purpose including

seeing to it that proper instructions were conveyed to the broker who sold the stock. What he really did is further corroborated by the evidence of his other speculative transactions begun for the first time in the spring of 1928. The evidence shows which 1000 shares he sold and the law permitted him to sell those particular shares. The decision of the Board that he sold 1000 shares out of his original 1926 purchase is therefore without support either in fact or in law and should be reversed. "The mind staggers over giving sanction to a finding that something is true which we know is not true," *United States v. Alpha Portland Cement Co.*, 257 Fed. 432, 434.

IV. Even if the shares sold were not identified Article 58 of Regulations 74 is nevertheless inapplicable and the profit must be determined under general principles of law.

(a) By its very terms Article 58, which was relied upon by the Board, is inapplicable to the facts of this case.

That article of the regulations was expressly relied upon by the Board in its opinion at R. 14 and is printed more fully at page 5 of this brief. The only provision with which we are now concerned, however, is its opening sentence which provides the sole condition upon which it operates—

"When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock."

By its very terms it is applicable only when stock is sold "from *lots* purchased at different dates and at different prices." That is distinctly not the fact here. The evidence shows that the 1000 shares of stock sold were sold from the one single lot of 1000 purchased in June, 1928. Entirely aside from the identification of shares of stock this regulation raises the new question of identification of lots of stock. There was just one lot bought in 1928. Lots, unlike shares, do not have certificates or certificate numbers. They cannot therefore be subject to the same strict rule of earmarking by certificate numbers. The lot purchased in 1928 has not only been identified as the lot sold but it was not purchased at different dates. It was all one lot purchased on one date.

Furthermore Article 58 provides a presumption as to what is then deemed to have happened only when certain premises or conditions obtain. It goes no further. It does not even suggest a presumption as to what premises or conditions shall be deemed to have obtained. It applies only "when shares * * * are sold from lots purchased at different dates and at different prices." Such a condition may exist in many cases, but there is neither presumption nor evidence that it existed in the present case. In fact that is the very issue at stake here, and to assume that this condition existed is to assume at the very outset the answer to the only issue in the case. Article 58 affords no help in the present case because it does not apply. The 1000 shares purchased in June, 1928, were a single lot. They were not "lots purchased at different dates and at different prices." Whether these 1000 shares were the same 1000 shares that were sold in October and November is the crucial issue in the case. It can-

not be answered by applying a presumption which by its very terms is conditioned upon assuming one and denying the other of the two possible answers to the issue of the case. To do so is simply to place oneself in the position of the proverbial dog chasing its tail around a circle. The *Skinner* case, *supra*, affords just as perfect an example of the existence of such conditions as the present case does of their non-existence. The fact that such conditions may and frequently do exist, as in the *Skinner* case, only confirms that this regulation must be confined in its operation to cases where those conditions do exist, and that there is therefore no necessity for distorting or stretching its provisions on the theory that they must mean something and apply to some kind of a case.

It is submitted therefore that Article 58 is not applicable, and that if this court does not agree that the shares sold have been identified then the profit here must be computed according to general principles of law as more fully discussed in sub-point (c), under this point.

(b) Article 58 of Regulations 74, even if held to be applicable to the present case, is to that extent unreasonable and invalid.

It is familiar law that a regulation made by administrative officers is not valid unless it is reasonably adapted to the enforcement of the statute. *Maryland Casualty Co. v. United States*, 251 U. S. 342, 349, and cases there cited. Article 58, at least insofar as it can be held to be applicable to the present case, is clearly unreasonable and therefore invalid. Mr. Turner owned those original 1200 shares. *Meyer*, Section 42,

supra. One of the incidents of that ownership for purposes of the income tax acts is the right "to decide" to keep certain shares and to sell certain shares. *Howbert v. Penrose*, 38 F. (2d) 577, 578. He did decide to do a certain thing, he had a right to do that thing, and he did everything within his power to do it, and if any regulation arbitrarily and unnecessarily says he must be presumed to have done just the opposite thing, that regulation is obviously unreasonable. There is no court decision sustaining this article under these circumstances. That it is arbitrary has been expressly ruled by a Circuit Court of Appeals. *Snyder v. Commissioner*, 54 F. (2d) 57-58. That it is necessary only "in the absence of something else" is ruled in the same paragraph of the opinion in that case. It cannot therefore be necessary where as here there is no "absence of something else." On the contrary as we have seen in Point I, *supra*, there is here very much more "something else" than there was in the *Penrose* case. We do not want to unduly lengthen this brief by the repetition of a lengthy quotation, but we trust that the quotation from the *Penrose* case at pages 20-24, *supra*, will be read again in the present condition.

Nor do we wish to be misunderstood. We do not suggest that Article 58 may not be perfectly valid under certain circumstances. We insist, however, that it is not valid if it would be applicable to the circumstances of the present case where definite evidence has been given as to the identity of lots and dates of purchase. That the decisions of the Circuit Courts of Appeal do not go so far as to recognize its validity in a case such as the present is most concisely shown in a short excerpt from that portion of the opinion in the *Skinner* case which cites the opinion in the *Penrose*

case. See 45 F. (2d) at page 570 where the Circuit Court of Appeals for the Second Circuit said with respect to an identical provision of the regulations under an earlier act—

“Such a regulation, creating the presumption as to the property sold *where no evidence is offered as to identity of lots and dates of purchase*, has been recognized as effective and controlling. *Howbert v. Penrose*, 38 F. (2d) 577 (C. C. A. 10); *United States v. Kemp* (C. C. A. 12 F. (2d) 7).”

(c) If for either reason Article 58 cannot be applied and the shares sold are not identified, then the profit must be determined by general principles of law under which there was no profit on sales of these shares until the entire capital investment therein had been recovered.

The Commissioner, acting jointly with the Secretary of the Treasury, has express power under the statute to make regulations which may even be arbitrary so long as they are reasonable and within the scope of the authority conferred. Revenue Act of 1928, Sec. 62, 45 Stat. 810. But neither he alone (*e. g.*, in his capacity of making a determination such as that here applied for) nor this Board nor the courts have any such power. If then there is no such regulation applicable (and for reasons shown in sub-points (a) and (b), *supra* there is not), and if the shares sold cannot be identified, the profit must be computed under general principles of law. Those principles have been finally announced by the Supreme Court in a very recent opinion handed down since the mailing of the deficiency letter in the present case.

We refer to *Burnet v. Logan*, 283 U. S. 404. That, too, was a case of a sale of shares of stock. The facts were somewhat different, but a general principle was announced which is equally applicable in all cases where for one reason or another it is impractical to compute exactly how much of each receipt is profit. In that fundamental respect that case and the present one are substantially alike, and the general rule applied in one must from its very nature be equally applicable in the other. There a block of stock had been sold for a lump sum plus a future annual payment of an indeterminate amount. The question was what part, if any, of the first payment was profit, which is identically the same question as in the present case. There, as here, the Commissioner had proposed an arbitrary method (in that case a prorating of each dollar received as part return of cost and part profit), but he had no duly promulgated regulations to support him. The Supreme Court swept all that away and went back to the basic and fundamental principle that there is no profit until cost has been recovered. The court said at page 412—

“The circuit court of appeals held that, in the circumstances, it was impossible to determine with fair certainty the market value of the agreement by the Youngstown Company to pay 60 cents per ton. Also, that respondent was entitled to the return of her capital—the value of 250 shares on March 1, 1913, and the assessed value of the interest derived from her mother—before she could be charged with any taxable income. As this had not in fact been returned, there was no taxable income.

We agree with the result reached by the circuit court of appeals.

The 1916 transaction was a sale of stock—not an exchange of property. We are not dealing with royalties or deductions from gross income because of depletion of mining property. Nor does the situation demand that an effort be made to place according to the best available data some approximate value upon the contract for future payments. This probably was necessary in order to assess the mother's estate. *As annual payments on account of extracted ore come in they can be readily apportioned first as return of capital and later as profit. The liability for income tax ultimately can be fairly determined without resort to mere estimates, assumptions and speculation. When the profit, if any, is actually realized, the taxpayer will be required to respond.* The consideration for the sale was \$2,200,000.00 in cash and the promise of future money payments wholly contingent upon facts and circumstances not possible to foretell with anything like fair certainty. The promise was in no proper sense equivalent to cash. It had no ascertainable fair market value. The transaction was not a closed one. Respondent might never recoup her capital investment from payments only conditionally promised. Prior to 1921 all receipts from the sale of her shares amounted to less than their value on March 1, 1913. *She properly demanded the return of her capital investment before assessment of any taxable profit based on conjecture."*

To much the same effect is the decision of this court in *Kirkland v. Burnet*, 61 App. D. C. 88, 57 F. (2d) 608. By a curious coincidence, which is not altogether without significance, a later sentence of this same Article 58 provides as follows with regard to the sale of stock acquired under somewhat different circumstances:

“Where common stock is received as a bonus with the purchase of preferred stock or bonds, the total purchase price shall be fairly apportioned between such common stock and the securities purchased for the purpose of determining the portion of the cost attributable to each class of stock or securities, but if that should be impracticable in any case, no profit on any subsequent sale of any part of the stock or securities will be realized until out of the proceeds of sales shall have been recovered the total cost.”

That two additional and entirely different principles should be thus in effect legislated into this very same article of the regulations does not speak any too strongly for the reasonableness and the fairness of the third principle which has been applied to this case by the Commissioner and the Board. Passing that by, however, the important thing is that the same article of the regulations recognizes prorating, and if that is inapplicable, then a complete withdrawal of investment untaxed before any profit is realized as being at least equally reasonable. As a matter of fact this last principle that no profit is realized on any sale of part of the stock until out of the proceeds of the sales the total cost has been recovered is not only the one which has been recognized by the Supreme Court in the *Logan* case as generally applicable in the absence of any valid regulation but it also has been approved by this court in the *Kirkland* case where in reversing the Board this court said:

“This is true because the regulation is drawn in recognition of the fact that there is no tax without ‘gain’, and a necessary factor in determining gain is ascertainment of cost. And so the regula-

tion provides that where more than one class of securities is bought for a single price and it is not practicable to allocate a definite part of the price to any one class, the taxpayer, in the event he sells a part, shall not account for gain or loss until he has recovered his whole investment. The subsequent ascertainment of separate value of the securities purchased is therefore not enough unless it affords the means thereby of doing what prior thereto was impossible. This, we think, is not true in this case, and, if we are correct in that regard, it follows, we think, that the 'event' of which the Board speaks, viz., the exchange, did not affect the situation or make inapplicable the Regulation on which petitioner relies. Petitioner has returned as gain the total excess received over cost. As he sells from time to time the remainder of his shares, the whole amount received will be gain; and taxable, and so as the gain accrues the tax applies, which we mention merely to show that the rule invoked by petitioner is not unfair."

We believe that the 1000 shares sold in the fall of 1928 have been identified and that there was a substantial profit and a corresponding tax thereon as originally returned by Turner. But if this court should hold otherwise we submit that in no event is the first provision of Article 58 applicable, and that in that event general principles of law alone apply and the profit if any must be determined in accordance with the principles approved and applied by the Supreme Court in the *Logan* case and by this court in the *Kirkland* case.

V. Even if Article 58 is applicable it must be strictly applied according to its terms, which has not been done.

This is a point which we scarcely conceive that this court will need to reach or consider. If it should, however, hold that the stock sold in the fall of 1928 has not been identified, that Article 58 is applicable, and that if so applied it is valid, then we do at least insist that it should be applied strictly according to its terms. It is obviously arbitrary. It has been judicially held to be arbitrary by the Circuit Court of Appeals for the Third Circuit in the *Snyder* case, *supra*. Being arbitrary it is only right that it should, if applicable at all, be applied literally and strictly. It provides that when applied "the stock sold shall be charged against the earliest *purchases* of such stock." There were only two purchases. One in 1926 of 1200 shares and the other in 1928 of 1000 shares. There had already been sold 300 shares in May, 1928. If the later sale of 1000 shares was not identified then by the same token the earlier sale of the 300 shares could not possibly have been identified and it must therefore be charged under Article 58 against the original purchase of 1200 shares, which would leave available out of that purchase only 900 shares. The last 100 shares of that 1000 shares sold in the fall of 1928 must of necessity therefore under the very terms of Article 58 be applied against the first 100 of the 1000 shares purchased in 1928. The Commissioner, and the Board in affirming his ruling, charged this last 100 shares against the 300 shares received as a stock dividend in November, 1926. Those shares were not received by purchase, and this action was therefore unwarranted by the even arbitrary pro-

visions of Article 58. We would ask therefore that in any event the decision below be modified at least with respect to the cost of the last 100 shares.

VI. Conclusion.

For the reasons set forth in Points I, II, and III, it is submitted that the decision below be reversed and the case remanded with directions to redetermine petitioner's tax on the basis that the cost of the 1000 shares sold in October and November of 1928 was \$143,225 (R. 21). The record already made is sufficient to support such a decision without any necessity for a new trial. *R. Hoe & Co. v. Commissioner*, 30 F. (2d) 630, 634. Otherwise the case should be disposed of as set forth in Points IV and V.

Respectfully,

JAMES CRAIG PEACOCK,
Counsel for Petitioner.

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

NOV 17 1933

No. 5903

Harry H. Dodge
CLERK

In the Court of Appeals of the District of
Columbia

ESTATE OF RICHARD B. TURNER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
REVENUE, RESPONDENT

ON PETITION FOR REVIEW OF DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS

BRIEF FOR THE RESPONDENT

SEWALL KEY,
J. P. JACKSON,

Special Assistants to the Attorney General.

INDEX

	Page
Opinion below.....	1
Jurisdiction.....	1
Questions presented.....	2
Statutes and regulations involved.....	3
Statement of facts.....	3
Summary of argument.....	7
Argument:	
I. The petition for review should be dismissed.....	9
II. It was impossible to identify the lots of stock which petitioner bought and sold on margin and hence it was proper to apply the rule charging the stock sold against the earliest purchases.....	18
Conclusion.....	27
Appendix.....	28-32

CITATIONS

Cases:

<i>American Exchange Bank v. Mitchell</i> , 179 Ill. App. 612.....	10
<i>Ayer v. Commissioner</i> , 63 F. (2d) 231.....	17
<i>Branch v. Mallory</i> , 8 Ga. App. 797.....	10
<i>Breswter v. Gage</i> , 280 U.S. 327.....	26
<i>Champion v. Commissioner</i> , 27 B.T.A.....	23
<i>Cleveland Trust Co. v. Commissioner</i> , 24 B.T.A. 132.....	23
<i>Estate of Columbus v. Monti</i> , 6 Minn. 568.....	10, 11
<i>Edward v. Douglas</i> , 269 U.S. 204.....	25
<i>Farrington v. Commissioner</i> , 30 F. (2d) 915, certiorari denied, 279 U.S. 873.....	25
<i>Ford Chain Block & Mfg. Co. v. Hess's Estate</i> , 55 Pa. Sup. 587.....	10
<i>Godair's Estate v. Case</i> , 220 Ill. App. 348.....	10
<i>Hedrick v. Commissioner</i> , 24 B.T.A. 444.....	23, 25
<i>Heinz v. Commissioner</i> , 28 B.T.A.....	23
<i>Horner v. Commissioner</i> , 28 B.T.A.....	23
<i>Howbert v. Penrose</i> , 38 F. (2d) 577.....	23, 25, 26
<i>Johnson v. Estate of Sam Farkas</i> , 96 S.E. 392.....	10
<i>Jenks v. Commissioner</i> , 22 B.T.A. 910.....	23
<i>Knox v. Greenfield Estate</i> , 7 Ga. App. 305.....	10
<i>Leng v. Commissioner</i> , 22 B.T.A. 149.....	23, 25
<i>Leland v. Commissioner</i> , 50 F. (2d) 527.....	26
<i>Matheson v. Commissioner</i> , 54 F. (2d) 537.....	11, 15
<i>McCaughn v. McCahan</i> , 39 F. (2d) 3.....	25

II

Cases—Continued.

	Page
<i>McNutt v. Bland</i> , 2 How. 1.....	11, 12
<i>Moore & McGee v. Burns & Co.</i> , 60 Ala. 269.....	10
<i>Moskal v. New Era Commercial Assn.</i> , 228 Ill. App. 278....	10
<i>National Lead Co. v. U.S.</i> , 252 U.S. 140.....	26
<i>Person v. Fidelity & Casualty Co.</i> , 92 Fed. 965.....	11
<i>Ray v. Pease</i> , 112 Ga. 675.....	10
<i>Rusk v. Commissioner</i> , 53 F. (2d) 428.....	11, 12, 15
<i>St. Paul Typothetae v. St. Paul Bookbinders' Union</i> , 94 Minn. 351.....	10
<i>Sexton v. Kessler</i> , 225 U.S. 90.....	21
<i>Scanlon v. Commissioner</i> , 21 B.T.A. 1120.....	23
<i>Skinner v. Eaton</i> , 45 F. (2d) 568, affirming 34 F. (2d) 575, certiorari denied, 283 U.S. 837.....	23, 24, 26
<i>Snyder v. Commissioner</i> , 54 F. (2d) 57.....	15, 19, 21, 23
<i>Steamboat Pembinaw and Owner v. Wilson</i> , 11 Iowa 479....	10
<i>Stryker, Burdett, v. Commissioner</i> , 27 B.T.A.....	23, 25
<i>Taylor v. Savage</i> , 1 How. 282.....	11
<i>Towne v. M'Elligott</i> , 274 Fed. 960.....	23

Statutes:

Revenue Act of 1926, c. 27, 44 Stat. 9:	
Sec. 2 (U.S.C.App., Title 26, Sec. 1262).....	28
Sec. 225 (U.S.C.App., Title 26, Sec. 966).....	28
Sec. 280 (U.S.C.App., Title 26, Sec. 1069).....	29, 30
Sec. 304 (U.S.C.App., Title 26, Sec. 1096).....	29
Sec. 305 (U.S.C.App., Title 26, Sec. 1097).....	29
Sec. 308 (U.S.C.App., Title 26, Sec. 1101).....	29
Sec. 1002 (U.S.C.App., Title 26, Sec. 1225).....	30
Revenue Act of 1928, c. 852, 45 Stat. 791, Sec. 113.....	30
Revised Statutes, Sec. 3467 (U.S.C., Title 31, Sec. 192)....	31

Miscellaneous:

47 C.J. 18,19,66.....	10
Treasury Regulations 45, Art. 39.....	26
Treasury Regulations 62, Art. 39.....	26
Treasury Regulations 65, Art. 39.....	26
Treasury Regulations 69, Art. 39.....	26
Treasury Regulations 74, Art. 58.....	19, 26, 31
Treasury Regulations 74, Art. 600.....	31
Treasury Regulations 74, Art. 628.....	32
Treasury Regulations 77, Art. 58.....	26

**In the Court of Appeals of the District of
Columbia**

No. 5903

ESTATE OF RICHARD B. TURNER, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL
Revenue, respondent

*ON PETITION FOR REVIEW OF DECISION OF THE UNITED
STATES BOARD OF TAX APPEALS*

BRIEF FOR THE RESPONDENT

OPINION BELOW

The only previous opinion in this case is that of the United States Board of Tax Appeals (R. 11-15), which is reported in 26 B.T.A. 1204.

JURISDICTION

This case involves income taxes for the year 1928 and this appeal is taken from a decision of the United States Board of Tax Appeals entered October 17, 1932, redetermining a deficiency of \$11,173.05 for the year 1928 (R. 15). The petition for review (R. 16-20) was filed January 6, 1933, pur-

suant to the Revenue Act of 1926, c. 27, 44 Stat. 9, Sections 1001, 1002, and 1003,¹ as amended by the Revenue Act of 1932, c. 209, 47 Stat. 169, Section 1101.

QUESTIONS PRESENTED

1. This case involves a deficiency asserted against an individual who, prior to his death, was an inhabitant of Chester, Pennsylvania, which is located within the Third Circuit. Upon the death of Turner prior to the Board hearing, the executor caused the Estate of Richard B. Turner to be substituted as a party. Can the estate be a party to this action?

2. In the absence of a stipulation agreeing that the appeal may be taken to this Court, has this Court jurisdiction under Section 1002 under the Revenue Act of 1926, or is jurisdiction limited to the Circuit Court of Appeals for the Third Circuit?

3. If this Court has jurisdiction, whether under Article 58, Regulations 74, a sale of a portion of the number of shares owned by the decedent through a broker on margin shall be applied against the latest shares purchased or against the shares first purchased?

¹ The appeal having been taken by the "Estate of Richard B. Turner" rather than by the executor of such estate, and no stipulation having been entered into agreeing that the appeal may be taken to this Court, it is the Government's position that this Court is without jurisdiction, as will be more fully pointed out under Point I, *infra*, p. 9.

STATUTES AND REGULATIONS INVOLVED

These will be found in the Appendix, *infra*, pp. 28-32.

STATEMENT OF FACTS

(1) *As to Jurisdiction.*—This is a proceeding for the redetermination of a deficiency in income taxes for the year 1928 in the sum of \$11,173.05, asserted against Richard B. Turner who, before his death in 1932, was an inhabitant of Chester, Pennsylvania (R. 3, 5), which is located within the Third Circuit. The deficiency notice was sent to the decedent during his lifetime (R. 5) and the decedent appealed to the Board of Tax Appeals (R. 3). On February 21, 1932, and prior to the Board hearing, the taxpayer died (R. 9). James L. Rankin was appointed as sole executor of the Estate of Richard B. Turner by the Orphan's Court of Delaware County, Pennsylvania. Upon the suggestion of death the Board on September 23, 1932, substituted the said James L. Rankin as party petitioner (R. 9-10). On October 4, 1932, the Board vacated the above order of September 23, 1932, and ordered "that the caption of the petition be amended to read "Estate of Richard B. Turner, deceased" (R. 10). The Board having sustained the Commissioner's determination (R. 15), the "Estate" brings the case to this Court by way of petition for review (R. 16), pursuant to Section 1002 (b) of the Revenue Act of 1926.

Under Point I, *infra*, pp. 9–18, the Government is moving to dismiss on the ground, (1) that the estate is not a legal personality and is not the proper party to the petition, and (2) that no stipulation having been filed, venue lies not with this Court but with the Circuit Court of Appeals for the Third Circuit.

(2) *The Merits.*—The merits involve the single question of whether under Article 58 of Regulations 74 the sale of a portion of the number of shares of stock owned by the decedent through a broker on margin shall be applied against the latest shares purchased or against the first shares purchased. The facts as relating to this issue were found by the Board of Tax Appeals to be as follows (R. 11–13):

1. The decedent, who died subsequent to the filing of the petition in this case, was during the taxable year here involved and for many years prior thereto president and principal owner of the Turner Supply Company, Chester, Pennsylvania. From 1924 until his death in 1932, he was sick, and from 1928 on blind, and his two closest business associates (one was his personal attorney and also the secretary of the company, and the other was manager of the company) had to and did handle a great many of his personal affairs, including the transactions hereinafter referred to.

2. Early in 1926 a distribution in kind was made of the estate of the decedent's father, at which time he received as a part of his share of the estate about \$20,000 in bonds. He did not believe in bonds as an investment and desired to change his inheritance

from his father from bonds into stock. He had several friends who were interested in United Gas Improvement Company of Philadelphia, and after conversations with them decided to purchase as many shares of stock of the United Gas Improvement Company as the funds to be obtained from the sale of his bonds would warrant. At his direction his attorney opened for him a marginal account with West and Company, a brokerage firm, and with the proceeds of the bonds he purchased on margin during the early part of 1926, 1,200 shares of United Gas Improvement Company stock at a total cost of \$117,202.50.

3. On November 22, 1926, decedent was credited by his broker with 300 shares of United Gas Improvement Company stock as a stock dividend on the 1,200 shares which he had purchased, making a total of 1,500 shares of that stock held on margin on December 31, 1926.

4. During 1927 the decedent had no marginal transactions in this or any other stock and took no active part in the market and at the end of that year his margin account showed 1,500 shares of United Gas Improvement Company stock long. On June 8, 1928, the decedent bought through the same broker on margin 1,000 shares of United Gas Improvement Company stock costing \$143,225.

On May 8, 1928, the decedent gave orders to his broker to sell 300 shares of United Gas Improvement Company stock, which was sold for \$44,619

net. On October 22, 1928, he sold an additional 500 shares of the same stock for \$73,865, and on November 7, 1928, an additional 500 shares for \$74,115, making a total selling price for all of this stock sold in 1928 of \$192,599.

The Commissioner included in decedent's income for 1928 the sum of \$92,864, representing profit on the sale of 1,300 shares of United Gas Improvement Company stock in 1928. The profit was computed as follows:

The cost of the 1,300 shares was computed at \$99,735 by taking the earliest purchases in 1926 together with the 25% stock dividend on each such purchase as follows:

125 shares (100+25) cost	\$9,020
625 " (500+125) cost	44,475
125 " (100+25) cost	9,095
425 " cost	37,145
1,300	\$99,735

This last item was computed by taking the cost of the 400 shares bought June 14, 1926 (\$43,700); adding 100 shares received as a stock dividend which would give a total of 500 shares; dividing 500 into the cost of \$43,700, which would give a cost per share of \$87.40; and multiplying this \$87.40 by 425 (the number of shares necessary to make up the total of 1,300 shares) would give a cost of \$37,145 as above. The total cost of \$99,735 computed as above when deducted from the total selling price of \$192,599, leaves a profit of \$92,864.

The decedent always intended to retain the ownership on margin of 1,200 shares of the United Gas Improvement Company stock since he had faith in the company and desired to hold that in lieu of the bonds which he had received from the estate of his father. In giving orders to his broker to sell 1,300 shares of the stock in 1928, the decedent did not specify any particular shares to be sold. An employee of the broker understood, however, that the decedent desired to retain 1,200 shares to take the place of the bonds which he had received from his father. The decedent had made it plain to his associates that the 1,200 shares were in the nature of a permanent commitment on his part.

The Board sustained the Commissioner's determination, holding that under Article 58, Regulations 74, the sale in 1928 should be charged against 1926 purchases and not the 1928 purchases.

SUMMARY OF ARGUMENT

1. The petition should be dismissed, because it was filed by the "Estate of Richard B. Turner, deceased." An estate, as such, is not a legal entity and is incapable of suing and being sued. The proper party in interest is the executor of the estate, who is not a party to the petition. Without a proper party petitioner, there is no case, and under familiar rules the petition should be dismissed.

Moreover, venue does not lie with this Court, but with the Circuit Court of Appeals for the Third

Circuit. No stipulation was filed agreeing that this Court might hear the case. Venue is governed by Section 1002 (a) of the Revenue Act of 1926, and under that section appeals from the Board of Tax Appeals are to be taken to the Circuit whereof the executor is an inhabitant. Section 1002 (b) is not applicable, since it deals only with cases of estates, i.e., cases where an estate is liable for estate taxes or where an estate is liable for income taxes on income earned during liquidation. This is the case of an individual, the tax being asserted against an individual in his lifetime, and the individual having appealed to the Board. On his death, pending hearing before the Board, his executor, as an individual, succeeded to his interest. Venue lies with the Circuit Court of Appeals for the circuit wherein the executor is an inhabitant, which in this case is the Third Circuit.

2. Should this Court entertain jurisdiction, the decision of the Board should be affirmed. The decedent bought stock in 1926 and similar stock in 1928. He sold part of his total purchases in 1928. The Commissioner held that the 1928 sale should be applied against the earliest purchases. The petitioner contends that the decedent intended to sell the 1928 purchases. Article 58, Regulations 74, provides that where stock is sold from lots purchased at different dates and at different prices and the identity of the lots cannot be determined, the stock sold shall be charged to the earliest purchases of

such stock. The record shows that the stock purchased and sold on margin could not be identified and that the provisions of the regulations are applicable. Intent is not a governing factor. The regulation is reasonable and has received legislative and judicial approval. Other decisions uphold the decision below.

ARGUMENT

I

The petition for review should be dismissed

This is a proceeding for the redetermination of a deficiency in income taxes for the year 1928 in the sum of \$11,173.05 asserted against Richard B. Turner. The deficiency notice was sent to the decedent during his lifetime and he appealed to the Board of Tax Appeals. On February 21, 1932, prior to the hearing before the Board, the taxpayer died and upon motion of counsel the "Estate of Richard B. Turner" was substituted. It should be noted that according to a certificate attached to the motion, James L. Rankin was appointed by the Orphan's Court of Delaware County, Pennsylvania, as sole executor of the decedent's estate. At first the Board entered an order substituting said James L. Rankin, Executor, as petitioner, but later, upon motion of counsel, this order was vacated and the Board ordered that "the caption of the petition read '*Estate of Richard B. Turner, deceased*'" (R. 9-10). The Board having sustained the Commis-

sioner's determination, the "Estate of Richard B. Turner, deceased", filed a petition for review with this Court (R. 16-20). It is the Government's position that said petition should be dismissed because the "Estate of Richard B. Turner, deceased", is not a legal personality and is not a proper party before this Court.

It is well settled that in all civil actions the prime requisites as to parties is that the plaintiff or defendant be either a natural or artificial person, someone against whom the court may direct its processes. *Steamboat Pembina and Owner v. Wilson*, 11 Iowa 479, 480; *American Exchange Bank v. Mitchell*, 179 Ill. App. 612, 615; *Moore & McGee v. Burns & Co.*, 60 Ala. 269, 270; *Moskal v. New Era Commercial Assn.*, 228 Ill. App. 278, 279; *St. Paul Typothetae v. St. Paul Bookbinders' Union*, 94 Minn. 351, 357; 47 C.J. 18, 19, 66. The estate of a decedent, *eo nomine*, is not such a party and it is well settled that an appeal taken in the name of a decedent without naming the administrators or executors is fatal beyond hope of amendment. *Knox v. Greenfield Estate*, 7 Ga. App. 305, 306; *Estate of John Columbus v. Monti*, 6 Minn. 568; *Godair's Estate v. Case*, 220 Ill. App. 348; *Ray v. Pease*, 112 Ga. 675; *Johnson v. Estate of Sam Farkas*, 96 S.E. 392; (Tex. Civ. App.), *Ford Chain Block & Mfg. Co. v. Hess's Estate*, 55 Pa. Sup. 587; *Branch v. Mallory*, 8 Ga. App. 797; 47 C.J. 18, 19, 66. Thus, in *Knox v. Greenfield Estate*, *supra*, the court said (p. 306):

A dead man cannot be sued. The estate of a dead man is mere inanimate property. Suits to bind the estate of a dead man should be brought in the name of a personal representative—an executor, administrator, etc. This is no mere technicality. * * *

And in *Estate of John Columbus v. Monti, supra*, the Supreme Court of Minnesota said (p. 569):

There should always be a competent party representing every interest that is litigated in Court, in order that the process of the Court may have someone to operate upon. The estate of a decedent has no legal personality that can have a status in court. It is merely the subject matter of the contest, and must in all transactions connected with it be represented by some person or persons capable in the law of suing and being sued. The controversy therefore is not properly before this Court, and the appeal should be dismissed.

Clearly, this general rule is likewise the rule in the Federal courts. After the death of a person his personal representatives become the real parties in interest, and no further proceedings may be had against the estate nor can a case be prosecuted in the name of the estate until such personal representatives are made parties. *McNutt v. Bland*, 2 How. 1, 14; *Taylor v. Savage*, 1 How. 282, 285, *id.*, 2 How. 394, 396; *Person v. Fidelity & Casualty Co.*, 92 Fed. 965, 968 (C.C.A. 6th); *Matheson v. Commissioner*, 54 F. (2d) 537 (C.C.A. 2d); *Rusk v.*

Commissioner, 53 F. (2d) 428 (C.C.A. 7th). As said by the Supreme Court in the *McNutt* case, *supra* (p. 14):

The personal representative is, therefore, the real party in interest before the court, 12 Pet. 171, and succeeds to all the rights of those they represent, by operation of law; and no other persons are capable, as representatives of the personalty, of suing or being sued. * * *

Under the authorities, it would seem clear that the appeal in this case prosecuted in the name of the "Estate of Richard B. Turner, deceased," rather than by the executor of such estate, is improper and that the petition should be dismissed for want of proper party-petitioner.

It is true, as the petitioner will undoubtedly argue, that the revenue acts treat an estate as a taxable entity, and that section 2 (a) (1) of the Revenue Act of 1926, *infra*, p. 28, defines the term "person" to include an estate. But this treatment was merely a matter of legislative convenience in the drafting of the act so that the general provisions of the act might apply to estates as well as to other taxpayers. This classification was for the limited purposes of the act, as is disclosed by Section 2 (a), above referred to, which provides, "When used in this Act—", the term "person" shall include estates. Congress nowhere has shown a purpose to endow estates generally with legal personality, capable of appearing as a party in

court. On the contrary, the revenue acts have recognized that an estate is not a legal entity; that it is incapable of acting except through a personal representative. Section 225 (a) of the 1926 Act, *infra*, p. 28, provides that *the fiduciary* shall make returns of estates earning income. Section 225 (b) of the Act, *infra*, p. 28, provides that, "Any fiduciary required to make a return under this Act shall be subject to all the provisions of this Act which apply to individuals." Under Section 304 (a) of the Act, *infra*, p. 29, the *executor* must file a return for the estate for estate tax purposes. Under Section 304 (a) the executor is obligated to pay the tax. In case of deficiency, the Commissioner, under Section 308 (a), sends notice thereof to the executor, and "the executor may file a petition with the Board of Tax Appeals." Under Section 3467 of the Revised Statutes, *infra*, p. 31, the personal representative is held personally liable if he settles an estate without paying taxes due the Government, and under Section 280 (a) (2) of the Revenue Act of 1926 the Commissioner may proceed against such fiduciary as if he were the taxpayer. Thus, throughout the Act, Congress has recognized that an estate is not a legal entity; that it can act only by and through the personal representatives.

Mention should also be made of Section 223 (c) of the 1926 Act, which provides:

If the taxpayer is unable to make his own return, the return shall be made by a duly

authorized agent or by the guardian or other person charged with the care of the person or property of such taxpayer.

The return in this case was filed by the individual decedent in his lifetime, but he died prior to such filing. The return of income earned during his lifetime, would, under this section be filed by his personal representative, not by his estate as such. Thus Congress again recognized that the true successor in interest and the only representative of the decedent is the personal representative.

We submit that the "Estate of Richard B. Turner, deceased", is not a legal entity, and that the petition should be dismissed for want of a proper party-petitioner.²

The petition should be dismissed for another reason. Section 1002 of the Revenue Act of 1926 prescribes the venue on appeal of Board of Tax Appeals cases. Subdivision (d) of Section 1002, *infra*, p. 30, provides that Board decisions may, by stipulation, be reviewed by this Court. But no such stipulation was filed in this case. Subdivi-

² As shown above, a party-petitioner is essential to the prosecution of the appeal and where no proper legal personality is named or otherwise disclosed by the petition, it will be dismissed. This defect in the petition may not be cured in this Court by the substitution of the executor because since there is no petitioner before this Court, there is no case. Cf. *Branch v. Mallory*, *supra*, 8 Ga. App. 797. Even if the Court permits the substitution of the executor, the petition must be dismissed because this Court is without jurisdiction, as will be hereinafter shown.

sion (a) of Section 1002, *infra*, p. 30, provides that Board decisions may be reviewed—

In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

This subdivision clearly governs the venue in this case. This is the case of an individual, the tax being asserted against Richard B. Turner in his lifetime, who carried the case to the Board of Tax Appeals. The courts have held that where an individual dies after appealing to the Board, venue is governed by Subdivision (a); that the personal representatives of the decedent's estate become the real parties in interest, and venue is laid to the circuit whereof they are inhabitants. *Matheson v. Commissioner, supra*; *Rusk v. Commissioner, supra*. In this case the Orphan's Court of Delaware County, Pennsylvania, appointed James L. Rankin as sole Executor of the decedent's estate. He, therefore, became the real party in interest and under the above cases venue lay where Rankin was an inhabitant. Undoubtedly that was the Third Circuit.

However, as will be hereinafter shown, the merits of this case involve the application of Article 58 of Regulations 74. As will be shown later, in *Snyder v. Commissioner*, 54 F. (2d) 57, the Circuit Court of Appeals for the Third Circuit decided a case

similar to the one here presented directly against the taxpayer. Consequently, to avoid taking the appeal to the Third Circuit and being confronted with an adverse decision, counsel for petitioner has devised the theory that the Estate is an entity in an effort to take the appeal to this Court, where it considers its chances of prevailing more favorable. To this end it secured from the Board an order vacating the original order substituting the Executor as party and had the "Estate" substituted. The theory is that an estate is a person within the meaning of Section 2 (a) (1) of the Revenue Act, and that therefore venue on appeal is governed, not by Section 1002 (a), but by Section 1002 (b) of the Act. Subdivision (b) provides that Board decisions may be reviewed—

In the case of a person (other than an individual), * * * by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

The argument is that, this being the case of an estate, who is a person, and such estate having made no return, venue lies with this Court. But the reasoning is fallacious because this is not the case of an estate. It is the case of an individual, the tax having been asserted against the individual in his lifetime and he having appealed to the Board. The successor to, and representative of, the dece-

dent with respect to taxes asserted against him during his lifetime, was his personal representative, not his estate, as such. Under the *Matheson* and *Rusk* cases, *supra*, the Executor became the real party in interest and venue is governed by Section 1002 (a), not by Section 1002 (b). Section 1002 (b), relating to cases of estates, clearly related only to two classes of cases; first, those cases where the estate, during the process of liquidation, earned income, in which event the executor under Section 225 (a), *supra*, files a return reporting income; second, estate-tax cases where under Section 304 (a), *supra*, the executor files estate-tax returns. In case of deficiency in either of these cases the Commissioner sends his notice to the executor and the executor appeals to the Board. Venue on appeal then lies to the circuit where is located the office of the collector where the estate return was filed. Clearly these are the cases of estate as contemplated by Section 1002 (b). But neither of these situations is presented here. This is not the case of an estate earning income or the case of an estate tax, but is the case of an individual, involving the individual taxes asserted prior to the individual's death. The distinction is clearly pointed out in *Ayer v. Commissioner*, 63 F. (2d) 231 (C.C.A. 2d).

We submit that there is no proper party-petitioner before this Court; that venue is governed by Section 1002 (a) and is properly laid only to the circuit whereof the Executor is an inhabitant; and

that, therefore, this Court is without jurisdiction. Wherefore, it is respectfully urged that the petition be dismissed.³

II

It was impossible to identify the lots of stock which petitioner bought and sold on margin, and hence it was proper to apply the rule charging the stock sold against the earliest purchases

We think the petition should be dismissed for the reasons hereinbefore stated; but aside from this, the Board was clearly right in sustaining the Commissioner's determination of the deficiency.

The decedent, in 1926, bought on margin through a stock broker 1,200 shares of United Gas and Improvement Company stock upon which, in the same year, he received 300 shares as a 25% stock dividend, making a total held on margin at the end of 1926 of 1,500 shares. He had no marginal transactions in 1927. On June 8, 1928, the decedent bought on margin an additional 1,000 shares of United Gas and Improvement Company stock; and during the same year he sold 1,300 shares of said stock (R. 21).

The Commissioner, in determining the profit from the sale of the 1,300 shares in 1928, charged the sales against the earliest purchases of the stock

³ We are informed, off the record, that in order to protect itself, in event of dismissal by this Court, the Estate has filed a petition with the Circuit Court of Appeals for the Third Circuit so that dismissal of the petition here will not deny to the Estate the right to a hearing in the Third Circuit, where venue properly lies.

in accordance with the so-called "first-in, first-out" rule contained in Article 58 of Regulations 74, and this action was affirmed by the Board. Petitioner contends that decedent always intended to keep the original 1,200 shares purchased in 1926 and that the 1,300 shares sold in 1928 consisted of the 300 stock dividend shares and the 1,000 shares purchased in 1928.

Article 58 of Regulations 74, *infra*, p. 31, provides:

When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock. * * *

As suggested in *Snyder v. Commissioner*, 54 F. (2d) 57, 58 (C.C.A. 3d), this regulation was evidently adopted with especial reference to gains and losses in marginal transactions where identification is impossible. Marginal transactions are matters of common knowledge. As this Court knows, one dealing on margin does not deal in actual identifiable stock certificates. When an order is placed with a broker to buy certain stock, the broker executes the order by "purchasing" from among his other customers, who wish to sell that particular stock, the number of shares requested. Lacking such, he procures the stock from other brokers who have the stock for sale. The stock so procured is commingled with similar stock held by the broker.

Each customer is merely charged on the broker's books with the number of shares ordered. No entry is made on the books of the serial numbers of the certificates. The certificates are not issued in the name of the customer but in the name of the broker or in street names. The broker makes no allocation in the ordinary course of any particular stock certificates to any particular client; nor are the certificates earmarked in any way. All stock of the same kind is commingled and held by the broker for the common benefit of all dealing in that particular stock; so if twenty-five customers deal in the same stock, the broker can not identify any of that stock as belonging to any particular one of the twenty-five customers. The broker may hold thousands of shares of the stock in which a customer deals, yet the broker can not identify any particular stock as belonging to that customer or to anyone else because it is the common property of all customers dealing in that stock.

This common fund is in a constant state of flux. It is being constantly increased by new purchases and decreased by new sales. The broker may pledge the whole fund or deliver it all in satisfaction of later orders, and he may satisfy the earlier customers with any stock that he may have on hand or that he buys when time for delivery comes. He is only bound to keep enough stock to satisfy his contracts. Stock on margin is a "fungible mass." The situation is analogous to that of a grain ele-

vator. A depositor in such an elevator may have a property in the grain kept therein although the keeper is at liberty to mix his own or other grain with the deposit and empty and refill the receptacle twenty times before making good his receipt to the depositor concerned. So it is with stock on margin. See *Sexton v. Kessler*, 225 U.S. 90, 97, 98. Since all sales by customers are made from the common fund, no particular identifiable stock is sold. The selling customer is merely credited on the books of the broker with so many shares sold.

In such a system, an order placed by a customer to buy or sell does not mean that there is any actual transfer of the number of shares covered by the order. Whether the broker actually receives or delivers the same number depends upon whether there are orders from other customers for the same stock. In other words, the broker receives or delivers only the number needed to make his customers' orders balance and actual delivery or exchange of certificates is solely a matter between different brokers, not a matter between the customer and his broker. If purchases and sales are equal there would be no clearing of stock certificates but the transactions would be "washed out" by the clearing house.

In *Snyder v. Commissioner*, *supra*, the court explained the method as follows (p. 58):

* * * in marginal transactions * * *
 shares purchased by a customer, while legally "owned" by him, are evidenced by a

certificate not in his name but in the name of the broker until the transaction is closed out by sale or payment of the full purchase price. The evidence of the transaction and of the customer's ownership is merely a book entry of a debit of the shares purchased against a credit of the margin paid. The shares are commingled with perhaps many thousands held by the broker for other customers, subject always to be hypothecated by him in raising the difference in money between the customer's margin and the purchase price of the shares, which of course the broker must pay in order to get a certificate. The shares are not delivered or earmarked or allocated to the customer even on the books.

That this situation prevailed in this case so that it was impossible to identify the particular lot of stock sold in 1928 is entirely clear. The record shows that when the decedent made purchases and sales through his broker there was no delivery to or receipt from him of the actual certificates of stock. The certificates were not issued in the name of the decedent. He gave an order to the broker to buy or sell so many shares and received notice the following day that so many shares were bought or sold. The broker cleared through a clearing house and always kept or had certificates for exactly the number of shares that its customers were long; but the broker could not say that certain certificates or certain numbers were the decedent's (R. 24, 25).

From this it is clear that the decedent did not deal in identifiable certificates, and identity of the lots could not be determined. The regulation is therefore applicable, and the Commissioner was entirely justified in charging the sale to the purchases in 1926 rather than the later purchases in 1928.

There are a number of cases squarely in point, all of which sustain the decision below: *Snyder v. Commissioner, supra*; *Skinner v. Eaton*, 45 F. (2d) 568 (C.C.A. 2d), affirming 34 F. (2d) 575, certiorari denied, 283 U.S. 837; *Towne v. M'Elligott*, 274 Fed. 960 (S.D.N.Y.); *Burdett Stryker v. Commissioner*, 21 B.T.A. 561; *Christian F. Leng v. Commissioner*, 22 B.T.A. 149; *William P. Jenks v. Commissioner*, 22 B.T.A. 910; *Cleveland Trust Co. v. Commissioner*, 24 B.T.A. 132; *J. T. Hedrick v. Commissioner*, 24 B.T.A. 444; *M. J. Scanlon v. Commissioner*, 21 B.T.A. 1120; *David J. Champion v. Commissioner*, 27 B.T.A. —; *Henry C. Heinz v. Commissioner*, 28 B.T.A. —; *Mary E. Horner v. Commissioner*, 28 B.T.A. —.

The petitioner points to *Howbert v. Penrose*, 38 F. (2d) 577 (C.C.A. 10th), as being contrary; but that case is readily distinguishable. There the taxpayer was not dealing on margin, but had purchased outright certain stock and had actual possession of the certificates. There the District Court held that the "identity of the lots" could be and had been determined, and that the taxpayer "intended to and did sell" certain identifiable shares.

Although there was evidence to the contrary, the appellate court affirmed because there was sufficient evidence to support the lower court's findings. In the instant case the decedent was dealing on margin; he never had possession of any particular certificates; the identity of the lots variously purchased had never been, and could never be, determined; the Board did not find that the decedent intended to and did sell certain identifiable certificates, but found to the contrary.

The petitioner's chief argument is that the decedent intended to sell the latest stock and that intent controls. But it is apparent from the language of the regulation that actual identification and not mere intent is the controlling factor. Intent is "a mental condition entirely 'which falls short of evidential' identification." *Snyder v. Commissioner, supra* (p. 59). In *Skinner v. Eaton, supra*, the Circuit Court of Appeals for the Second Circuit disposed of a similar contention in the following language (p. 570):

The declarations of a taxpayer as to his intention to sell the more recently purchased stock and to retain his original holdings, made orally, are insufficient to change the result. They indicate merely a purpose which he may not have adhered to. They in no way marked the particular shares of stock here under consideration, the identity of which the trial judge has found to have been lost.

Even in *Howbert v. Penrose, supra*, upon which the petitioner places so much reliance, it was said (p. 578):

So it is of the question of intent of the seller, a point much labored at the trial and here; it is some evidence as to what was done, but not conclusive. The ultimate question is, What was done? * * *

What was done in this case is undisputed. In giving orders to his broker to sell 1,300 shares of the stock in 1928, the decedent did not specify any particular shares to be sold (R. 13, 24). The broker, in executing the order, did not and could not identify the shares actually sold (R. 25).

We submit that whatever may have been the intention of the decedent there was no identification within the meaning of the regulation. See *Burdett Stryker v. Commissioner, supra*; *Christian F. Leng v. Commissioner, supra*; *J. T. Hedrick v. Commissioner, supra*.

The petitioner argues, not seriously, we believe (Br. 37), that the regulation is invalid. The regulation was designed to meet a situation where the exact facts are incapable of proof. Under such circumstances, the courts recognize the value of a presumption as an expedient for the ready solution of disputes. *Edward v. Douglas*, 269 U.S. 204; *McCaughn v. McCahan*, 39 F. (2d) 3 (C.C.A. 3d); *Farrington v. Commissioner*, 30 F. (2d) 915 (C.C.A. 1st), certiorari denied, 279 U.S. 873;

Leland v. Commissioner, 50 F. (2d) 527 (C.C.A. 1st).

This particular regulation was first adopted in Article 4, Paragraph 60, of Treasury Regulations 33 (Revised), promulgated under the Revenue Act of 1916, as amended by the Act of October 3, 1917, and has been continued under the later acts. Article 39 of Regulations 45, 62, 65, and 69, and Article 58 of Regulations 74 and 77. As pointed out in *Skinner v. Eaton*, *supra*, Congress, by reenacting without substantial change the provision of the statute to which it relates, has approved the regulation. Consequently, it has the force and effect of law. *Brewster v. Gage*, 280 U.S. 327; *National Lead Co. v. United States*, 252 U.S. 140. The regulation has received the approval of all the courts that have had occasion to pass upon it (*Skinner v. Eaton*, *supra*; *Snyder v. Commissioner*, *supra*; *Howbert v. Penrose*, *supra*) and has been applied in all the Board cases referred to above. We submit, at this late date, its validity cannot be questioned.

It being established that the stock sold in 1928 was incapable of being identified and the regulation being applicable, all that remains is a mere mechanical operation of computing the gain under the provisions of Article 600 and 628 of the regulations, *infra*, pp. 31-32. The Commissioner computed the tax on that basis and the Board approved. This computation was accurate. There is no merit to

the petitioner's suggestion that these regulations should be ignored in the process.

CONCLUSION

The decision of the Board should be affirmed.
Respectfully submitted.

SEWALL KEY,

J. P. JACKSON,

Special Assistants to the Attorney General.

NOVEMBER 1933.

APPENDIX

REVENUE ACT OF 1926, C. 27. 44 STAT. 9

SEC. 2. (a) *When used in this Act.*—(1) The term “person” means an individual, a trust or estate, a partnership, or a corporation (U.S.C.App., Title 26, Sec. 1262).

SEC. 225. (a) Every fiduciary (except a receiver appointed by authority of law in possession of part only of the property of an individual) shall make under oath a return for any of the following individuals, estates, or trusts for which he acts, stating specifically the items of gross income thereof and the deductions and credits allowed under this title—

* * * * *

(b) Under such regulations as the Commissioner with the approval of the Secretary may prescribe a return made by one of two or more joint fiduciaries and filed in the office of the collector of the district where such fiduciary resides shall be sufficient compliance with the above requirement. Such fiduciary shall make oath (1) that he has sufficient knowledge of the affairs of the individual, estate, or trust for which the return is made, to enable him to make the return, and (2) that the return is, to the best of his knowledge and belief, true and correct. Any fiduciary required to make a return under this Act shall be subject to all the provisions of this Act which apply to individuals (U.S.C.App., Title 26, Sec. 966).

SEC. 304. (a) The executor, within two months after the decedent's death, or within a like period after qualifying as such, shall give written notice thereof to the collector. The executor shall also, at such times and in such manner as may be required by regulations made pursuant to law, file with the collector a return under oath in duplicate, * * * (U.S.C.App., Title 26, Sec. 1096).

SEC. 305. (a) The tax imposed by this title shall be due and payable one year after the decedent's death, and shall be paid by the executor to the collector (U.S.C.App., Title 26, Sec. 1097).

SEC. 308. (a) If the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the Commissioner is authorized to send notice of such deficiency to the executor by registered mail. Within 60 days after such notice is mailed (not counting Sunday as the sixtieth day), the executor may file a petition with the Board of Tax Appeals for a redetermination of the deficiency. * * * (U.S.C.App., Title 26, Sec. 1101).

SEC. 280. (a) The amounts of the following liabilities shall, except as hereinafter in this section provided, be assessed, collected, and paid in the same manner and subject to the same provisions and limitations as in the case of a deficiency in a tax imposed by this title (including the provisions in case of delinquency in payment after notice and demand, the provisions authorizing distraint and proceedings in court for collection, and the provisions prohibiting claims and suits for refunds):

* * * * *

(2) The liability of a fiduciary under section 3467 of the Revised Statutes in respect of the payment of

any such tax from the estate of the taxpayer. Any such liability may be either as to the amount of tax shown on the return or as to any deficiency in tax (U.S.C.App., Title 26, Sec. 1069).

SEC. 1002. Such decision may be reviewed—

(a) In the case of an individual, by the Circuit Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.

(c) In the case of a corporation which had no principal place of business or principal office or agency in the United States, then by the Court of Appeals of the District of Columbia.

(d) In the case of an agreement between the Commissioner and the taxpayer, then by the Circuit Court of Appeals for the circuit, or the Court of Appeals of the District of Columbia, as stipulated in such agreement (U.S.C.App., Title 26, Sec. 1225).

REVENUE ACT OF 1928, C. 852, 45 STAT. 791

SEC. 113. *Basis for Determining gain or loss.*—

(a) *Property acquired after February 28, 1913.*—
The basis for determining the gain or loss from the sale or other disposition of property acquired after February 28, 1913, shall be the cost of such property; * * *.

REVISED STATUTES

SEC. 3467. Every executor, administrator, or assignee, or other person, who pays any debt due by the person or estate from whom or for which he acts, before he satisfies and pays the debts due to the United States from such person or estate, shall become answerable in his own person and estate for the debts so due to the United States, or for so much thereof as may remain due and unpaid (U.S.C., Title 31, Sec. 192).

TREASURY REGULATIONS 74

ART. 58. *Sale of stock and rights.*—When shares of stock in a corporation are sold from lots purchased at different dates and at different prices and the identity of the lots cannot be determined, the stock sold shall be charged against the earliest purchases of such stock. The excess of the amount realized on the sale over the cost or other basis of the stock will constitute gain. In the case of stock in respect of which any stock dividend was paid, the basis for determining gain or loss from a sale of a share of such stock shall be ascertained in accordance with the principles laid down in article 600. * * *

ART. 600. *Stock or securities distributed in reorganization.*—In the case of stock or securities acquired by a shareholder after December 31, 1923, in connection with a transaction described in section 112 (g) and article 576, the basis in the case of the stock in respect of which the distribution was made shall be apportioned between such stock and the stock or securities distributed to the shareholder. The basis for the old and new shares shall

be determined in accordance with the following rules:

(1) Where the stock distributed in reorganization is all of substantially the same character or preference as the stock in respect of which the distribution is made, the basis of each share will be the quotient of the cost or other basis of the old shares of stock divided by the total number of the old and new shares.

ART. 628. *Stock dividends*.—The issuance of its own stock by a corporation as a dividend to its shareholders does not result in taxable income to such shareholders, but gain may be derived or loss sustained by the shareholders from the sale of such stock. The amount of gain derived or loss sustained from the sale of such stock, or from the sale of the stock in respect of which it is issued, shall be determined as provided in articles 561 and 600.

FOR MR. JUSTICE GRONER

COURT OF APPEALS
DISTRICT OF COLUMBIA
FILED

NOV 29 1933

Therese H. Stodges

CLERK

IN THE
Court of Appeals, District of Columbia

—
No. 5903.
—

ESTATE OF RICHARD B. TURNER, *Petitioner,*

v.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

—
REPLY BRIEF FOR PETITIONER.
—

JAMES CRAIG PEACOCK,
Counsel for Petitioner.

IN THE
Court of Appeals, District of Columbia

No. 5903.

ESTATE OF RICHARD B. TURNER, *Petitioner*,

v.

GUY T. HELVERING, Commissioner of Internal Revenue,
Respondent.

REPLY BRIEF FOR PETITIONER.

This reply brief is made necessary by the respondent's rather belated action in raising for the first time in his brief an objection to the jurisdiction of this court.* Advantage will also be taken of this opportunity to bring to the court's attention two decisions bearing on the merits which have been published since the preparation of our original brief.

*It is only fair to state that on February 14, 1933, the day when this petition was docketed in this court, petitioner's counsel so advised the General Counsel of the Bureau of Internal Revenue, then counsel for respondent, and, referring to a suggestion that had already been made by the latter that a motion to dismiss for lack of jurisdiction on grounds similar to those now advanced would be made, suggested the prompt filing of such motion so that it could be acted upon before substantial expense had been incurred in printing the record and the briefs on the merits. A few days later respondent's counsel advised us that on further consideration he found no objection to the jurisdiction and to go ahead with the case.

The Facts.

One serious omission in the facts as stated on page 3 of respondent's brief and further discussed on pages 9 and 16 thereof should be noted. The Board did not "at first" enter an order substituting the executor as petitioner, nor was its order of October 4, 1932, vacating the earlier order of September 23, 1932, made for the reason so gratuitously assumed at the top of page 16. The order of October 4, 1932, was entered because on April 27, 1932, a motion to substitute the Estate of Richard B. Turner, Deceased, as petitioner had already been granted by the Board (R. 9, 10), a fact which respondent's brief entirely overlooks. The order of September 23 was vacated because it had been entered "in error", the matter having already been fully taken care of by the much earlier order of April 27. (R. 10.)

ARGUMENT.

Re Jurisdiction.

The jurisdiction of this court is completely and exclusively provided for by Sections 1001 and 1002 of the Revenue Act of 1926 (44 Stat. 109, 110) which provide:

"Sec. 1001. (a) The *decision of the Board* rendered after the enactment of this Act (except as provided in subdivision (j) of section 283 and in subdivision (h) of section 318) may be reviewed by a Circuit Court of Appeals, or the Court of Appeals of the District of Columbia, as hereinafter provided, if a petition for such review is filed by either the Commissioner or the taxpayer within six months after the decision is rendered.

* * * * *

Sec. 1002. *Such decision* may be reviewed—
(a) In the case of an individual, by the Circuit

Court of Appeals for the circuit whereof he is an inhabitant, or if not an inhabitant of any circuit, then by the Court of Appeals of the District of Columbia.

(b) In the case of a person (other than an individual), except as provided in subdivision (c), by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.”

Subdivisions (a) and (b) together constitute a complete scheme for review of the Board's decision, the remaining subdivisions (c) and (d) relating only to exceptional cases in which a corporation has no office within the United States or where a stipulation is filed.

Sec. 2(a)(1) of the same Act (44 Stat. 9) provides:

“Sec. 2. (a) When used in this Act—

(1) The term ‘person’ *means* an individual, a trust or *estate*, a partnership, or a corporation.”

Incidentally it may be noted that the same definition has been re-enacted without change in Section 701(a)(1) of the Revenue Act of 1928 (45 Stat. 878) and Section 1111(a)(1) of the Revenue Act of 1932 (47 Stat. 289).

In the present case which had been tried and considered by the Board under the caption “Estate of Richard B. Turner, Deceased, Petitioner, v. Commissioner of Internal Revenue, Respondent,” (R. 8, 9, 10, 20), findings of fact and an opinion were promulgated under that caption on October 14, 1932 (R. 11, 13), and the decision here sought to be reviewed was entered on October 17, 1932, against the “Estate of

Richard B. Turner, Deceased, Petitioner,” (R. 15).

That the Estate is the only party who could bring a petition for review in any court, and that it has properly brought its petition to this court seem scarcely open to argument. It is the “decision of the Board” (Section 1001(a)), and not the earlier determination of the Commissioner, which is to be reviewed. Such decision may be reviewed only as provided in Sections 1002(a) or (b). The Estate of Richard B. Turner, Deceased, is the aggrieved party in the Board’s decision, and is the only party to that decision other than the respondent Commissioner. The Estate is obviously not an individual. It is equally obvious that under the definition in Section 2(a)(1) it is a person “when used in this act” and it necessarily follows that it is likewise a person within the meaning of Section 1002(b) of that same Act. The return, however, was not filed by the estate but by the decedent who did not die until February 21, 1932 (R. 9), and the case thus falls squarely within the alternative provision of Section 1002(b) that this court has jurisdiction “in case such person made no return.” Conversely the executor was not mentioned in the findings, opinion, or decision, was not a party to either, and could therefore have no standing to file a petition for review.

The burden of respondent’s argument is that “this is the case of an individual”—a phrase reiterated on at least four different pages of his brief. True enough it arises out of a tax originally imposed upon an individual then living, but he had died before the decision here sought to be reviewed was entered, and that decision did not and could not hold him liable for any deficiency. It held the Estate of Richard B. Turner, Deceased, the present petitioner, to be liable for the

deficiency. That the coordinate introductory phrases "in the case of an individual" in Section 1002(a) and "in the case of a person (other than an individual)" in Section 1002(b) speak as of the date of the decision to be reviewed is the only interpretation that can possibly be accorded to them. That this is so is demonstrated beyond question when we read further and find that in the first instance the review is "by the Circuit Court of Appeals for the Circuit whereof he is an inhabitant" and in the second instance it is ordinarily "by the Circuit Court of Appeals for the Circuit in which is located the office of the collector to whom such person made the return." This recognition of the fact that an individual may have removed to a different circuit in the many years that frequently elapse between the taxable year and the decision with respect thereto by the Board, or that even a collector's office may find itself in a different Circuit after the lapse of a similar period (as in the case of those offices now in the new Tenth Circuit but formerly in the old Eighth Circuit), can leave no question as to the date as of which those provisions speak and that the present case is "the case of a person (other than an individual)."

The respondent's argument against the jurisdiction of this court is two-fold. Its first branch (brief, pages 9-14) to the effect that the estate is not a legal entity and that the petition should be dismissed for want of a proper party petitioner is based on a long line of cases at common law, etc. The present case, however, is not a common law action. It is purely a statutory proceeding resting entirely upon the provisions of a statute which are complete in themselves and include an express definition of the terms used. Resort must therefore be had to the terms of the statute, and the

common law cases relied upon by respondent are not in point.

Furthermore, that statutory proceeding is exclusively for review of the orders of the Board of Tax Appeals, and from the very nature of the case the moving party in such a review must necessarily be the party aggrieved by the final decision of the Board. The Board of Tax Appeals, however, is an executive or administrative board. *Old Colony Trust Company v. Commissioner*, 279 U. S. 716, 725. It has been in existence for nearly ten years. It was created by Section 900 of the Revenue Act of 1924 (43 Stat. 336), Section 2(a)(1) of which contained this identically same definition of person meaning an estate (*id.* Sec. 254) as did the same numbered section of the Revenue Act of 1926. From the very outset the Board has by virtue of that section recognized estates as proper parties before it just as much as executors or other fiduciaries. Typical such cases may be found in practically every volume of its reports. *Appeal of Frederick H. Butte Estate*, 1 B. T. A. 415; *Appeal of Estate of William H. Larkin*, 1 B. T. A. 1045; *Appeal of Estate of Charles S. Boas*, 2 B. T. A. 522; *Appeal of Estate of P. E. O'Hair*, 3 B. T. A. 1039, and so on right down through the most recent volumes, *Estate of John W. Rapp v. Commissioner*, 24 B. T. A. 1061; *Estate of Rudolph F. Rabe, Sr. v. Commissioner*, 25 B. T. A. 1242; etc. Congress has reenacted without any change this definition of "person" in each of the subsequent Revenue Acts of 1926, 1928, and 1932, and the principle that in so doing it has approved this administrative interpretation is especially applicable to such a provision of administrative law. *National Lead Co. v.*

United States, 252 U. S. 140; *Brewster v. Gage*, 280 U. S. 327.

Respondent's attempt at page 12 of his brief to confess and avoid this distinction between a suit at common law and a purely statutory proceeding for review of an administrative order is little short of ludicrous. His *ipse dixit* that the definition of the term "person" in Section 2(a)(1) of that same act as including an estate "when used in this act" was "merely a matter of legislative convenience so that the general provisions of the act might apply to estates as well as to other taxpayers," with the implication that it does not apply to Sections 1001 and 1002, simply flies in the very teeth of the provisions of the act. What more "general provision" is there then this very provision of Section 1002? The definition is equally applicable to the term "person" in Section 1002 as it is to that term as used in any other section of "this act." Section 1002 is just as much a part of "this act" as is any other section. We agree with respondent that "this classification was for the limited purposes of the act" but we submit that the provision of Section 1002 that a person may take a petition for review is just as much a purpose of the act as is any provision of Section 602 or 802 or any other section.

Nor are we alone in our belief. The Circuit Court of Appeals for the Second Circuit has expressly so held in *Ayer et al. v. Commissioner of Internal Revenue*, 63 F. (2d) 231, certiorari denied, 289 U. S. 752. Even though there the return and the petitions to both the Board and the appellate court had been filed in the name of the executors it was nevertheless held that "this is the case of an estate" and for that reason Section 1002(b) and not Section 1002(a) is applicable.

The court said, in its opinion rendered by Judge Learned Hand—

“We think that this court has no jurisdiction over the case. Section 1002(a) of the Revenue Act of 1926 (26 U. S. C. A. Sec. 1225(a) provides that ‘in the case of an individual,’ the decision of the Board shall be reviewed by ‘the Circuit Court of Appeals * * * whereof he is an inhabitant, or if not an inhabitant of any circuit,’ then by the Court of Appeals of the District of Columbia. Section 1002(b), 26 U. S. C. A. Sec. 1225(b), provides for review ‘in the case of a person (other than an individual) * * * by the Circuit Court of Appeals for the circuit in which is located the office of the collector to whom such person made the return, or in case such person made no return, then by the Court of Appeals of the District of Columbia.’ The word, ‘person,’ is defined in section 2 of the act as meaning ‘an individual, a trust or estate, a partnership or a corporation.’ *Thus section 1002(b) is to be construed as though it read ‘in case of a trust or estate, a partnership or a corporation,’ and as this is the case of an ‘estate,’* the only circuit in which the petition should have been filed was that in which the ‘estate’ petitioning had filed its return. That was Massachusetts, and the First Circuit alone had jurisdiction.”

There can be no question as to what that court held with respect to this one issue on which it squarely based its decision, even though the *dicta* in its comments upon an earlier decision on an entirely different question may be somewhat confusing. The case at bar “is the case of an ‘estate,’ ” and as “the ‘estate’ petitioning” filed no return this court alone has jurisdiction.

The other branch of respondent’s argument (brief,

pages 14-18) to the effect that venue is governed by Section 1002(a) is so self-conflicting that it literally defeats its own purpose. In one breath he argues that this "is the case of an individual" because the tax was asserted against the individual (Turner) in his lifetime, while in the next breath he just as seriously argues that the executor (Rankin) "became the real party in interest" and under Section 1002(a) venue "is properly laid only to the Circuit whereof the executor is an inhabitant." In a word his argument is one built on shifting sands. He does not know where he stands, and he never will until he gets back on the solid ground of the express and complete provisions of the Revenue Act. Neither do the cases cited on page 15 of his brief sustain the broad proposition for which he urges them. At the most those cases hold no more than that *if* the executor or executors instead of the estate are the petitioners before the Board venue is laid under subdivision (a) to the circuit whereof the executors are inhabitants.

To sum up. The statute recognizes that an estate is a legal entity capable of being a party to the statutory procedure which it creates in Sections 1001 *et seq.* for review of the Board's decision. It expressly provides that whenever "used in this Act" the term "person" means *inter alia* an "estate," and equally expressly provides in Section 1002(b) that in the case of such a person other than an individual venue shall lie to this court when such person filed no return. Here the decision sought to be reviewed is a decision of the Board in a proceeding to which the *only* party (other than the respondent Commissioner) was an estate. *If there was any decision at all*, and we have shown that under the statute the Board was right in

recognizing the estate as a proper party, that decision certainly could be reviewed only on the petition of the party against whom it was rendered. That party was an estate which had filed no return, and under the provisions of the statute that estate alone is entitled to petition for review of that decision, and this court alone has jurisdiction to entertain such a petition.

On the Merits.

Since the preparation of our original brief the present respondent in an official ruling (G. C. M. 11743, published in official Internal Revenue Bulletin, Vol. 12, No. 27, page 2) has expressly recognized that *intent* should be considered in the application of the so-called "first in, first out" rule. G. C. M. 11743 is a long technical ruling in answer to a number of questions as to the application of this rule. It is summarized in its head-note as holding:

"If stock rights issued in respect of several different lots of stock are exercised at the same time, any sale of stock acquired through such exercise will be presumed to have been made from stock acquired through rights issued in respect of the earliest acquired lot, and if the latter lot was also acquired through rights exercised at the same time as rights in other lots were exercised, then the same principle may be carried back as many 'generations' as are necessary in order to discover which lot should be presumed to have been sold first."

The ruling reads like a dissertation on higher mathematics and we are not so much interested in its details*

*G. C. M. 11743 is, however, well worth glancing over if the court is interested to see the absurdly ridiculous lengths to which the respondent is being forced by his continued insistence on "first in, first out."

except as it forms a background for the Commissioner's rather apologetic comment:

“While this may appear at first glance to be carrying the presumption of ‘first in, first out’ to rather ridiculous extremes, it must be recognized that, at best, the presumption is simply an arbitrary ‘rule of thumb’ which the courts have upheld.”

and for the following ruling at pages 6-7 on one of the specific questions which it considered:

“Question No. 3 relates to the case where A sold 100 shares, turning in certificate No. P and a certificate representing all the other shares owned, and inquires which shares were sold. It is known that the 98 shares represented by certificate No. P represent lots 5 to 8, inclusive, and the other certificate must therefore represent the 588 shares contained in lots 1 to 4, inclusive. It is arguable that, since A has turned in all his certificates, none of the shares sold can be identified as coming from any particular lot, and that consequently all the 100 shares should be presumed to have been sold from lot 1. This argument would be much stronger if certificate No. P, as well as the other certificate, had represented 100 or more shares, or if each certificate had represented less than 100 shares. But certificate No. P in fact contained less than 100 shares, while the other certificate contained more than 100 shares, and if A had desired to sell all the shares from the latter certificate he would not have needed to turn in certificate No. P Therefore, the most reasonable presumption is that A was selling all the shares represented by certificate No. P, and making up the balance of 2 shares from the other certificate. Accordingly, this office is of the opinion that all of lots 5 to 8, inclusive, had been sold,

together with 2 shares from lot 1. (Compare *Cleveland Trust Co. v. Commissioner*, *supra*; *Mowbert v. Penrose*, 38 Fed. (2d) 577; *M. J. Scanlon v. Commissioner*, 21 B. T. A. 1120.) However, if good evidence were introduced that A did not intend to sell any particular shares, and that his only purpose in turning in both certificates was to have all his remaining shares represented by one certificate, then probably all the shares should be presumed to have been taken from lot 1."

It would thus seem that the respondent cannot seriously object to the applicability of the *Taylor*, *Wagner*, *Hurd*, and *Embrey* cases cited at length in point I(b) of our original brief on the effect to be given the "intent" of the seller.

We would also call to the court's attention the recent decision of the Board of Tax Appeals in *Snyder v. Commissioner of Internal Revenue*, 29 B. T. A. . . ., (promulgated September 14, 1933). This too was a case of sales of stock held on margin. In sustaining the Commissioner's application of the "first in, first out" rule in the face of evidence as to a contrary intent on the part of the taxpayer the Board concluded its opinion as follows:

"Petitioner's principal argument is that the regulation applied here is invalid, under the decision in *Heiner v. Donnan*, 285 U. S. 312, which was decided since the previous case involving this same taxpayer. The *Donnan* case dealt with a conclusive presumption; hence, it involved an entirely different question and is readily distinguishable from this case, in which the presumption is rebuttable. 'A rebuttable presumption clearly is a rule of evidence' (*Heiner v. Donnan, supra*), and 'casts upon the person against whom it is applied the duty of going forward with his evidence on the

particular point to which the presumption relates.' *Manley v. Georgia*, 279 U. S. 1. It does not estop the taxpayer from establishing the existence of a fact. Where the taxpayer identifies the stock traded in the presumption does not apply. *Howbert v. Penrose*, 38 Fed. (2d) 577; *Cleveland Trust Co., Executor*, 24 B. T. A. 132. The presumption announced in the regulations merely follows the rule that has been in effect at least since the decision in *Towne v. McElligott* (decided in 1921), 274 Fed. 960; hence, it cannot be said to work any hardship on the taxpayer, inasmuch as he had ample warning of the necessity of putting his accounts in shape to enable him to identify his purchases and sales."

The last few lines just quoted reveal most conclusively the invalidity and unconstitutionality of any application of this rule to the present case. As brought out in our principal brief the evidence shows that *Turner had done everything possible to enable him to identify his purchases and sales*. The respondent, and the Board in sustaining him, are thus left upon the horns of the dilemma. If the "first in, first out" presumption is a rebuttable one, then the petitioner's evidence in the present case rebutted it. If on the contrary it is a conclusive presumption, then it *does* estop the taxpayer from establishing the existence of a fact. In which latter case it is unconstitutional for the same reason that the conclusive presumption of Section 302(c) of the Revenue Act of 1926, which provided that any transfer made within two years prior to the death of a decedent shall be deemed to have been made in contemplation of death for purposes of the federal estate tax, was held unconstitutional in the *Donnan*

case. In that case the Supreme Court held at page 325:

“that a statute which imposes a tax upon an assumption of fact which the taxpayer is forbidden to controvert, is so arbitrary and unreasonable that it cannot stand under the 14th Amendment.”

and at page 329:

“This court has held more than once that a statute creating a presumption which operates to deny a fair opportunity to rebut it violates the due process clause of the 14th Amendment.”

We submit therefore that either the “first in, first out” presumption is rebuttable by evidence of intent, or else it is unconstitutional because it operates to deny a fair opportunity to rebut it.

Respectfully,

JAMES CRAIG PEACOCK,
Counsel for Petitioner.

